Supreme Court, U.S.
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No. 91-6646

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

VERL HADLEY,
Petitioner

v.

UNITED STATES

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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JOINT APPENDIX

JOHN TREBON
(Appointed by this Court)
Security Pacific Bank Building
121 East Birch Avenue
Suite 207
Flagstaff, Arizona 86001
(602) 779-1713
Attorney for Petitioner

KENNETH W. STARR
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530
(202) 514-2217
Attorney for Respondent

PETITION FOR WRIT OF CERTIORARI FILED DECEMBER 9, 1991
CERTIORARI GRANTED MARCH 2, 1992

186PP

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RELEVANT DOCKET ENTRIES

Date	PROCEEDINGS
3/30/88	Criminal complaint filed against Mr. Hadley before United States Magistrate, District of Arizona
4/5/88	Mr. Hadley released with special conditions, including third party custody
4/27/88	Original indictment filed against Mr. Hadley (CR-88-00127-01)
5/11/88	Arraignment
11/7/88	Government's motion in limine to permit evidence of defendant's prior bad acts (CR44)
12/7/88	Mr. Hadley's response to motion in limine to permit evidence of defendant's prior bad acts filed (CR50)
12/21/88	Superceding indictment filed against Verl Hadley
1/4/89	Arraignment on superceding indictment
1/23/89	Mr. Hadley's motion to severe counts of the superceding indictment (CR59)
4/27/89	Defendant's motion to sever counts of the superceding indictment granted (CR100)
5/2/89	Jury trial begins
5/8/89	Government's motion in limine to permit evidence of defendant's prior bad acts granted per telephonic conference
5/15/89	Mr. Hadley's supplemental memorandum in opposition to government's motion in limine to permit evidence of prior bad acts under Rule 404(b) filed (CR117)
5/18/89	Jury trial completed. Jury verdict of guilty on Count Seven, Eight and Nine of the superceding indictment; jury verdict of not guilty on Counts Ten and Eleven of the superceding indictment

Date	PROCEEDINGS
8/21/89	Mr. Hadley sentenced to imprisonment for a term of thirty years on Count Seven of the superceding indictment, plus a fine of $10,000. Mr. Hadley's sentenced to imprisonment for a term of 108 months on Counts Eight and Nine of the superceding indictment, plus a fine of $10,000, as well as, a term of supervised release of 60 months upon Mr. Hadley's release. The sentence imposed on Counts Eight and Nine of the superceding indictment shall run consecutive to the sentence imposed on Count Seven
8/25/89	Notice of appeal filed by Mr. Hadley

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

No. CR-88-127-PCT-EHC

UNITED STATES OF AMERICA,
Plaintiff,

v.

VERL HADLEY,
Defendant.

VIO: 18 U.S.C. §§ 1153 &
ARS 13-1406, 13-1401
(Involuntary Sodomy)
6 Counts

18 U.S.C. §§ 2241(a)(1)
(Aggravated Sexual Abuse)
2 Counts

18 U.S.C. § 2244(a)(1) & (2)
(Abusive Sexual Contact)
2 Counts

18 U.S.C. § 1153 &
ARS 13-1410
(Child Molestation)
1 Count

SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

On or about September, 1986, at approximately 11:00 p.m., in the District of Arizona, within the confines of the Navajo Indian Reservation, Indian Country, near Kayenta, Arizona, VERL HADLEY, an Indian, did in-

tentionally and knowingly engage in involuntary sodomy, to wit: anal intercourse with Travis Yazzie, an Indian, without the consent of Travis Yazzie.

In violation of Arizona Revised Statutes 13-1406, 13-701, 13-801, a Class 2 felony and Title 18, United States Code, Section 1153.

COUNT II

On or about September, 1986, at approximately 1:00 a.m. and immediately subsequent to the indictment contained in Count I, in the District of Arizona, within the confines of the Navajo Indian Reservation, Indian Country, near Kayenta, Arizona, VERL HADLEY, an Indian, did intentionally and knowingly engage in involuntary sodomy, to wit; anal intercourse with Travis Yazzie, an Indian, without the consent of Travis Yazzie.

In violation of Arizona Revised Statutes 13-1406, 13-1401, 13-701, 13-801 a Class 2 felony and Title 18, United Code, Section 1153.

COUNT III

On or about September 5, 1985, in the District of Arizona, within the confines of the Navajo Indian Reservation, Indian Country, near Kayenta, Arizona, VERL HADLEY, an Indian, did intentionally and knowingly engage in involuntary sodomy, to wit; anal intercourse, with Cory Kay, an Indian child, while Cory Kay was lying on his stomach, and without the consent of Cory Kay.

In violation of Arizona Revised Statutes 13-1406, 13-1401, 13-701, 13-801 a Class 2 felony and Title 18, United States Code, Section 1153.

COUNT IV

On or about September 5, 1985, in the District of Arizona, within the confines of the Navajo Indian Reservation, Indian Country, near Kayenta, Arizona, VERL

HADLEY, an Indian, did intentionally and knowingly engage in involuntary sodomy, to wit; anal intercourse, Cory Kay, an Indian child, while Cory Kay was lying on his back, and without the consent of Cory Kay.

In violation of Arizona Revised Statutes 13-1406, 13-1401, 13-701 and 13-801, a Class 2 felony and Title 18, United States Code, Section 1153.

COUNT V

On or about September 5, 1985, in the District of Arizona, within the confines of the Navajo Indian Reservation, Indian Country, near Kayenta, Arizona, VERL HADLEY, an Indian, did intentionally and knowingly engage in involuntary sodomy, to wit; anal intercourse, with Cory Kay, an Indian child, while Cory Kay was on his hands and knees, and without the consent of Cory Kay.

In violation of Arizona Revised Statutes 13-1406, 13-1401, 13-701, 13-801 a Class 2 felony and Title 18, United States Code, Section 1153.

COUNT VI

On or about September 5, 1985, in the District of Arizona, within the confines of the Navajo Indian Reservation, Indian Country, near Kayenta, Arizona, VERL HADLEY, an Indian, did intentionally and knowingly engage in involuntary sodomy, to wit; anal intercourse, with Cory Kay, an Inidan child, while Cory Kay was seated on Hadley's lap, and without the consent of Cory Kay.

In violation of Arizona Revised Statutes 13-1406, 13-1401, 13-701, 13-801, a Class 2 felony and Title 18, United States Code, Section 1153.

COUNT VII

On or about October, 1987, in the District of Arizona, within the confines of the Navajo Indian Reservation,

Indian Country, near Kayenta, Arizona, VERL HADLEY, an Indian, knowingly caused and attempted to cause Amadee Roy to engage in a sexual act, to wit; penetration of the anal opening, by using force against Amadee Roy.

In violation of Title 18, United States Code, Sections 1153 and 2241(a)(1).

COUNT VIII

On or about November, 1987, in the District of Arizona, within the confines of the Navajo Indian Reservation, Indian Country, near Kayenta, Arizona, VERL HADLEY, an Indian, attempted to cause Amadee Roy to engage in a sexual act, to wit; penetration of the anal opening, by using force against Amadee Roy.

In violation of Title 18, United States Code, Sections 1153 and 2241(a)(1).

COUNT IX

On or about February 1, 1988, in the District of Arizona, within the confines of the Navajo Indian Reservation, Indian Country, near Kayenta, Arizona, VERL HADLEY, an Indian, knowingly engaged in sexual contact, to wit; intentionally touching the genitalia of Amadee Roy, an Indian child, twelve years of age, and at least four years younger than VERL HADLEY.

In violation of Title 18, United States Code, Section 2244(a)(2).

COUNT X

In about October, 1986, in the District of Arizona, within the confines of the Navajo Indian Reservation, Indian Country, near Chilchinbeto, Arizona, VERL HADLEY, an Indian, knowingly molested Jonathan Tsosie, an Indian child under the age of fifteen years, by directly touching his private parts, a class 2 felony dangerous crime against children.

In violation of Arizona Revised Statutes Sections 13-1410, 13-1401, 13-604.01, 13-701, and 13-801, Title 18, United States Code, Section 1152.

COUNT XI

On or about May, 1988, in the District of Arizona, within the confines of the Navajo Indian Reservation, Indian Country, near Chilchinbeto, Arizona, VERL HADLEY, an Indian, knowingly engaged in and caused sexual contact with Fernando Yazzie, an Indian child who had not attained the age of twelve years.

In violation of Title 18, United States Code, Section 2244(a)(1).

A TRUE BILL

/s/ Cicily A. Rhue
Foreman of the Grand Jury

Date: 12-21-88

STEPHEN M. MCNAMEE
United States Attorney
District of Arizona

/s/ Gary A. Husk
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

CR 88-127 PCT EHC

UNITED STATES OF AMERICA,
Plaintiff,

vs.

VERL HADLEY,
Defendant.

TELEPHONE CONFERENCE

* * * *

[2]

Phoenix, Arizona
April 27, 1989

PROCEEDINGS

THE CLERK: CR 88-127, United States of America versus Verl Hadley, hearing re pending motions.

THE COURT: All right, Mr. Trebon?

MR. TREBON: Yes, Judge.

THE COURT: And we have Mr. Husk here with us.

MR. TREBON: Okay.

THE COURT: Say hello, Mr. Husk.

MR. HUSK: Hello, Mr. Husk.

THE COURT: Well, I have been looking at our—the motions that we have had. We did enter an order yesterday, I believe. Nothing that was unexpected I am sure. We have entered an order dening your motion to dismiss, not with respect to vindictive prosecution, we are going to have an evidentiary hearing on that. But we have allowed the Government to amend those counts that we discussed, so you will have a copy of that order and I don't think that is any big problem that we have.

What I have been concerned with more is, looking at the various counts involving Mr. Hadley, and the implications of the number of counts, and what they are involved with, and trying to do what is right, as well as looking at it from an appellate standpoint, depending on what happens in the future.

[3] And I have—of course, Mr. Husk has just come in, I have not written any orders about the matters. I wanted to visit with everyone about it.

My tentative thoughts are, Mr. Husk and Mr. Trebon, that the case probably ought to be generally divided along the lines that it started out. And, that would involve Travis Yazzie and Cory Kay, in one combination. And the Amadee Roy, and Jonathan Tsosie, Fernando Yazzie, in the other things, other counts.

And so, I have tried to analyze it from the—kind of the issues that we would have, also giving thoughtful consideration to your avowal that Mr. Hadley intends to testify in the Cory Kay case.

MR. TREBON: I may need to amend that with you somewhat.

THE COURT: And that he—also, his general defense, otherwise, is lack of—or that it just didn't happen.

Here is the rationale that I have gone through. I think that, if, for instance, and I will invite Mr. Husk's, at least, option as to which of the series we would try first.

But I think, in the counts starting at Count 7, I believe, it is 7, 8, 9, 10, 11, that essentially, with one exception, they all involve a touching situation, or a contact situation. And so, I would think that if those counts were tried together, they are similar in character.

[4] And I think that prior bad acts, or prior acts, depending upon the circumstances of those acts, would be admissible in those counts involving the people that we have just named as to the intention, motive, plan, whatever, of making these touchings and contacts, and what the context of them were.

And, so that is the reason I put them all together and separated them from the first two.

I think, insofar as Yazzie is concerned, and Cory Kay, they are a, if nothing else, a lack of consent, involuntary force situations, and I think that, for instance, if you only tried Cory Kay, Travis Yazzie incidents would be admissible there, as other acts or vice versa.

And it seems to me that there is no demonstrated prejudice in trying those two victims together. And that the purposes of Rule 404(b), with respect to the different—admissibility of—and relationship of those acts, in looking at 403, Rule 403, with respect to the probative value outweighing the prejudicial effect, it seems to me clear that either one of those first two victims would be admissible, if you were only trying the other one alone.

And as I say, trying them both together, I think—I don't find that that would be unduly prejudicial.

So that is my tentative thoughts and I wanted to get your thoughts about that approach and what it might do to our [5] time in Prescott, and who might be necessary there and also to give that same opportunity to Mr. Husk.

So perhaps let's get Mr. Husk's reaction first, Mr. Trebon, and then yours.

Mr. Husk?

MR. HUSK: Thank you, Your Honor.

First of all, Your Honor, it would be the Government's position that, given that scenario which the Court indicated, the only major problem that the Government has, is that it would involve the testimony of witnesses on two separate occasions, basically, in two separate trials.

Obviously, the Government is concerned, in this type of case where children are very reluctant to come forward at all, and then to have to come into the courtroom on two separate occasions, it is the Government's contention that that places an unusual amount of stress and

an unusual amount of trauma on the child that is not necessary.

I know that there have been cases cited to that effect, certainly within the State of Arizona and, in fact, the United States Supreme Court, in the Coy versus Iowa decision, that address similar issues.

And basically, although it dealt with a—not necessarily videotape testimony, but the testimony of children whereby they are obstructed from view of the defendant. There were some similar concerns that were articulated by the United [6] States Supreme Court that are equally applicable in this particular situation, in that, specifically, the Court indicated that these type of cases are somewhat different and where the—whether it be in State or the Government, is in a position to provide the Court with information as to an individualized need for any unusual circumstances, or any unusual trauma that may be exhibited by requiring us to do so. That in those particular instances, the Court would be in a better position to make an individualized finding regarding those types of issues.

And it is the Government's concern, Your Honor, quite frankly, that, in this type of situation, where you have young boys that are extremely reluctant to go forward with their testimony, that requiring them to commit that —or to come in and commit themselves to going on the witness stand, and subjecting themselves to cross-examination not once, but twice, is very—a very traumatic experience for the particular witness.

And particularly, Your Honor, in view of the fact that depending on, again, which case the court hears that that information is going to come before the jury in the context of prior bad acts, anyway. So that it is not accomplishing anything as far as precluding information from the jury, because as the Court has indicated, in a particular situation, those type of prior bad acts would be admissible.

[7] So it is the Government's contention that, in view of the fact that the jury would hear that type of information anyway, that the only thing that that type of

severance would do would be to require the children to testify twice. And obviously, the Government is very opposed to that notion.

THE COURT: The only ones, under my viewpoint, Mr. Husk, that would have to testify twice would be Kay and Travis Yazzie.

MR. HUSK: That's correct, Your Honor.

THE COURT: And the others would not.

MR. HUSK: That's correct.

THE COURT: Well, I think that, given those circumstances, that that is really not something that justifies trying them all together. Because if that was true, you would try all child molestation cases together, regardless of how many victims there were. And I suppose that has been done, but in any event, it just seems to me that, looking at it realistically, the case can be divided in that way and that they are the only ones that would have to testify. Their testimony would be a matter of record once. The same lawyer, same defendants, and if something did happen to them, even, why then I would think that, apart from the credibility arguments, the evidence would be there for the second trial. All the confrontation issues would have been resolved.

So, your thought, Mr. Trebon?

[8] MR. TREBON: May I ask a question for clarification?

THE COURT: Yes.

MR. TREBON: I'm not sure, under the Court's analysis, why Yazzie and Kay would have to testify twice, because I thought the Court indicated that prior bad acts involving touching would be admissible against the counts involving Roy, and Jonathan Tsosie, and Fernando Yazzie, but not prior sodomy.

THE COURT: No. The touching was leading up to the sodomy, i.e., it is relevant, I think, for what the sexual context of it and what Mr. Hadley would have been touching them about.

And, so what I said was, that in the—in the Amadee Roy on down, that the prior bad acts involving Cory

Kay and Travis Yazzie would be—my ruling now would be admissible in those other cases. And then I would have to look at it, of course, and make any final ruling during the trial. But that is the basis upon which I would be severing them.

MR. TREBON: I see. I guess my initial reaction is—I am having trouble seeing what the benefit of the severance is, if all the same evidence is going to come in anyway.

THE COURT: Well, it isn't all going to come in, you see, with respect to Mr. Kay and Mr. Yazzie.

MR. TREBON: Oh, I see. When they are tried, then, the prior bad acts involving Roy, Jonathan Tsosie and Fernando [9] Yazzie would be admitted. Is that right?

THE COURT: When Amadee Roy, et. al., are tried, the prior bad acts involving Kay and Yazzie, I believe, would be admissible. And that would be my tentative ruling, subject to whatever occurred during the trial that might suggest to the contrary.

MR. TREBON: I see. But not the other way around then?

THE COURT: That's right. Because these others are not force and consent issues. Perhaps one with Amadee Roy, that is, using force in an attempt to, whatever. And that seems to be an intentional touching.

Are you suggesting we join that with Kay and Travis?

MR. TREBON: No. I'm sorry, which one?

THE COURT: The first count involving Amadee Roy is a force, lack of consent, isn't it?

MR. TREBON: No. I think that the way you have divided them is more intelligent than putting Roy back up with Travis and Cory Kay. I think the way you have done it, that makes sense to me. I'm not suggesting that you change that.

The only thing, I guess, I would suggest is that I would have no objection to adding Travis Yazzie to the second list, and keeping Cory Kay by himself.

And the only reason I do that is because our defense involving Cory Kay is inconsistent with our defense on the other counts.

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

(Caption Omitted in Printing)

TRIAL PROCEEDINGS

* * * *

[659] MR. HUSK: Your Honor, under the Rule 404(b), the evidence of other crimes, wrongs or acts is not admissible normally to prove the character of a person. However, as the Court is aware, may be admissible for the purpose of proving a motive.

And in this particular instance, where we have other children, some of which are very young, the question of motive is obviously very important.

And opportunity, in this particular case, as well, the opportunity issue is also present.

The intent as required under the statute, the intent to engage in the sexual activity under the particular statutes, which the defendant is charged with, is also present in these acts to establish an intent on the part of the defendant to sexually abuse minors.

Preparation on the part of the defendant is also present, it would be the Government's contention.

And finally, Your Honor, it would also establish that [660] this was not just a one time occurrence, this was not a mistake, this was not an accident, this was knowledge—it establishes knowledge on the part of the defendant with regards to these particular acts and therefore the Government would move for the admission of these acts.

Particularly given the fact that some of these young boys who have testified are of such a young age that this type of evidence and this type of prior bad acts would be

extremely probative in helping the jury determine whether or not the defendant used, in fact, the same method for his conduct and therefore committed the acts in question.

MR. TREBON: Your Honor, I believe the Government's argument today by far exceeds the argument it made originally in its original motion.

I think it argued motive and intent in the original motion, but even all of the reasons they offer now, which is the kitchen sink full of reasons—

THE COURT: Pardon?

MR. TREBON: Almost as if the kitchen sink full of reasons, I think is inadequate under 404(b). 404(b) explicitly states that prior bad acts cannot be admitted to show that the defendant acted in accordance with any propensity to do these acts on any particular occasion.

But yet that is exactly what would be the overwhelming effect of this evidence.

[661] The defense, I think, has pretty much hinted that throughout the Government's case so far and certainly it will be our defense when we present evidence, is that these children were influenced to say things about Mr. Hadley that weren't true. They were influenced to say things about Mr. Hadley that didn't happen.

We are never going to argue that sure Mr. Hadley inserted his penis in somebody's anus, but he did it innocently.

THE COURT: Well, you see, whether he did it innocently or not, the fact that he did it, and arguably attempted to do it here, or why he's touching these boys and doing these things, that, it seems to me, is the reason, if there is one, to admit these other acts.

Now, Mr. Hadley at least is—there is evidence of—evidence that you presented, that he was touching the boys' penises. One boy twice. That he had them on his lap. That the other—the first witness we had touched his penis. The second witness, he was either pinching or touching, et cetera.

Now, why is he doing these things? His acts with these other people, arguably, would tell the jury what his intention was, what his motive was, why he was doing these things with these three victims, alleged victims, that we are discussing.

MR. TREBON: Taking them one at a time, Jonathan Tsosie testified through the tape in his admission that the tape was [662] correct, that he was pinched on the arm and the leg. Pinching him on the arm and the leg doesn't constitute a crime.

THE COURT: It is going to be something for the jury to consider in light of Dr. Rozensweig's testimony that's coming up, as to the pattern of people and whether they change their stories and all of those kind of things. It is going to be up to the jury to decide which statement of Jonathan Tsosie's was correct.

MR. TREBON: That's correct, Your Honor. The point is that, I believe that there is no question that if somebody touches somebody else's penis, there is a sexual motive in it. We are not going to ever argue otherwise.

So the motive to touch someone's penis is not in question. The question is whether or not he, in fact, touched someone's penis. Our defense is that he did not.

THE COURT: Well, if he's going around touching other people's penises or doing different things, that is some evidence that he would be touching these people's penises for certain reasons, wouldn't it?

MR. TREBON: It would be very good evidence of that. In fact, the propensity evidence, however, it shows that he has propensity to do that. And that is exactly why you can't admit it under Rule 404. But there is other reasons why it should not be admitted as well. It is never that it is not relevant to admit under Rule 404.

[663] THE COURT: There has to be a balancing test and that is what I am going to do. Balancing I think—

MR. TREBON: The reason it is excluded is because it is considered too relevant.

THE COURT: The balancing is under Rule 403.

MR. TREBON: That's correct, Your Honor. But the reason that it is excluded under 404(b) is that it is deemed far too relevant, that that juries will convict based upon that pattern of conduct alone and not guiit proven on any specific instance that is being tried.

Here, not only are—the prior bad acts show propensity, but they are far more egregious in nature than the acts that are on trial.

If they come in, the fact that there was homosexual sodomy relations with these people, allegedly over a period of time, far overshadows the allegations that are being tried before the Court now.

If they come in, it is telegraphing a clear message of propensity to the jury that would never be able to be controlled with any instructions, that would overshadow the case completely and it will undoubtedly result in a conviction, based alone on those prior acts, if they are believed.

Number two, they certainly are going to result—the evidence relating to those next two people is greater than all [664] the evidence that we have seen so far or that we will see in this trial. The trial of those other bad acts is far more complicated, extensive, involves numerous more witnesses than this trial has.

So we will have a far greater trial on the prior bad acts than we will on the act in question itself. It will simply overshadow this case.

Cory Kay—I don't know if the Court is aware of all this, but I would like to briefly outline it.

Number one, both Travis Yazzie and Cory Kay involve allegations that occurred several years ago. They are not recent activity.

Cory Kay's incident in 1985, September 5th of 1985, four counts relating to September 5th is contained within the indictment. That was investigated by the Navajo Division of Public Safety back in 1985.

And they determined there wasn't sufficient evidence to bring charges. So, we have an old investigation, we have

police officers investigating it back then that would have to come in.

According to the police officers, Cory Kay refused to testify then. Cory Kay has a very bad reputation in terms of truth and veracity. We have a lot of witnesses to bring in about that.

Cory Kay's motive for reporting those incidents is [665] highly in question. We have many witnesses to bring in about that.

In fact, I believe the evidence would show that the police contacted him about raping a 14 year old girl and when he was talking about raping the 14 year old girl, he reported that he had been molested by Mr. Hadley.

In fact, he admitted that he had raped a 14 year old girl to the Doctor that saw him, he tried to determine if there was physical evidence that he had been sodomized.

He talked about—in the police department from the Navajo Division of Public Safety, he says there are several suspects, Morris Singer was a suspect, Arnold Dohi was a suspect, they are all listed as suspects in the Navajo Division of Public Safety.

THE COURT: Suspect of what?

MR. TREBON: Suspect of sodomizing Cory Kay. So who sodomized him, on what basis, is also going to be a substantial question.

It is going to far overshadow this case. The veracity of him is going to be a major question and numerous witnesses on both sides will have to be called in.

Prior inconsistent statements abound. It would—even if the Court finds that it is admissible for some purpose under 404(b), the prejudice involved in Cory Kay far outweighs the probative value, at least that is our position. We would [666] like the Court to consider that.

It would just be absolutely devastating to have to deal with that case to pretend any more that the focus is going to be on the allegations that have been set forth so far.

Essentially the same argument applies to Travis Yazzie. It is a very complicated thing. He was interviewed several times by the FBI, very old allegations, again, ones that, in this case, were never reported until several years later. I think Travis Yazzie is very—

THE COURT: Pardon?

MR. TREBON: Travis Yazzie, to my understanding has made very inconsistent statements about it. I do not believe that the Government could establish, even by a preponderance of the evidence, let alone clear and convincing evidence that those allegations took place.

I have great doubt whether or not they would be able to do that with Cory Kay.

The trial in those cases will greatly outshadow this case.

THE COURT: I thought—pardon me, someplace I got the idea that the Cory Kay case, insofar as your client was concerned, was a consent issue.

MR. TREBON: There is a consent issue there, because as I understand it, he told some people involved in the case that he had a sexual relationship with Mr. Hadley and these other [667] people, Morris Singer and Arnold Dohi, I believe are the two other suspects, I will have to check the report to be positive, for a number of years.

THE COURT: What's that have to do with consent? Oh, I see, all right.

MR. TREBON: He talks about having consensual relationships for years. And, how can I, in this trial, try a prior bad act, argue a consent defense here, that shows that there is no prior bad act in terms of a crime, but by then we have emasculated any chance to impress that upon the jury.

It leaves us with propensity all over the place. I have an untenable defense to it at a trial of this nature.

I think that is why the Court severed it. On its own it is a viable defense, but it certainly isn't if it is being tried as a prior bad act.

I believe that there is grave doubt about whether or not it took place at all as well, simply because of the way in

which it was brought up, the investigation by the Navajo Division of Public Safety and Cory Kay's credibility.

But I think that we leave this trial and the allegations in this case clearly will open the door to pure propensity, if we get into that.

T- be honest with you, Judge, I have no chance of winning this case if you let those things in. I don't care what the allegations are here or what the evidence to date has [668] been with respect to those, if those prior allegations come in, any count on the indictment against Verl Hadley is gone. That is how devastating that other evidence would be.

And, it is—it would show propensity far more than it would show these other issues. And our defense is that they didn't take place in this case involving the younger children. It simply did not take place. Not that there was consent, not that there was innocent touching, simply that there was no touching. The touching on the arm and the leg is not a crime. So, those aren't in issue.

The question is whether or not he ever touched someone's penis. And we—our position is that he did not.

And the cases that the Government relies upon is—I think I talked about it extensively in my memorandum, but when I looked at, it is not the best written memorandum, but it has a lot of authority in it.

And those—the Government is essentially putting forth the position that is allowed under Arizona law, which is the emotional propensity exception, which is created only for sex cases and allowed by Arizona, and a few other states. It is an antiquated rule that was developed in the 1800's and has been around every since then.

But it has been eliminated by the Federal Rules of Evidence. It is not allowed by Ninth Circuit law or under any federal cases that I am aware of that the Government cited.

[669] That emotional propensity exception is a rule that Arizona clings to and there is a couple of Law Review articles that talk about it, Professor Imperwink (phonetic), if I ever pronounce his name correctly, who

wrote a book called On Charge of Misconduct Evidence, talks about the Arizona rule. I quote him extensively in my memorandum.

That is not a rule that exists Yn federal court. And, somehow I got the feeling that when I was reading Mr. Husk's memorandum, that federal law doesn't have as many sex cases, so you need to look to state law, which has more progressive law in this area, but that is just not the case, Arizona is clinging to an antiquated rule, not a new rule, not a developing trend.

It is a rule that is slipping away with time. And it is clearly not allowed under the federal rules of evidence. There is no exceptions now for sex cases that don't exist in any other case.

With all the persuasion that I can, I ask this Court not to allow that in. If—I don't believe it meets the threshold under 404(b). Even if it did, the prejudice is absolutely incredible and there would be no way to control that with any instructions, if it was allowed in.

In addition, it would require a trial on collateral issues that, by the time we are done, will far overshadow the issues that are being tried now.

[670] Mr. Hadley can be tried on those at a later time. I think, there is enough evidence here about whether or not these kids were improperly influenced to say things, or not. That should be the issue for this jury.

THE COURT: Well, the issue ought to be whether he did it or didn't do it.

MR. TREBON: Exactly.

THE COURT: And all of the collateral issues with the investigators and what the investigators wrote down or didn't write down is the issue that is going to become perhaps what you would like to see the major issue.

MR. TREBON: Well, Your Honor, whether he did it or not has to depend upon what people say he did.

THE COURT: That's right. And what they say and not what investigators wrote down, in my good judgment.

MR. TREBON: Exactly.

THE COURT: I think it was obvious today, when we had the first witness. If you raise your voice at him and say "What?" He changes his answer.

I will look at it this evening and tell you in the morning what we are going to do. I am—I will just have to look at it.

The jury ought to know what kind of a person Mr. Hadley is, because it relates to his motive for doing things, or his intention for doing things with these children.

[671] And, for the jury to know whether or not—and this gets back again to your argument about the propensity issue, does prior conduct by Mr. Hadley tell us that that is why he was doing things with these children and therefore it is relevant on that and more probative than prejudicial. That is really the question that I have to look at and decide.

MR. TREBON: Your Honor, it is not our position I advocate—

THE COURT: Otherwise we are going to be trying the agents and not the defendant and that is a popular pastime also.

MR. TREBON: Your Honor, we are trying what the kids really said and whether or not they have been influenced to say things. The FBI never tape recorded any of their interviews with them.

THE COURT: As far as I know you tape recorded one. Maybe you tape recorded more. I don't know. But in any event—

MR. TREBON: Your Honor, not of any of the witnesses that have been present here as far as I know.

THE COURT: Why wasn't Amadee Roy tape recorded?

MR. TREBON: I was speaking to him out in the middle of the country in the back of my truck and I didn't feel it was appropriate to tape record.

THE COURT: You can argue all that to the jury too, you [672] see.

In any event I will look at it this evening. Common sense tells me that the jury ought to know something about Mr. Hadley. And how they know that, I don't know, because it does deal with his motive, his intention and whether or not he was a good guy taking students to the swimming pool, or taking them home, et cetera.

And, on the other hand, I see some of the things that Mr. Husk wants to get into that weren't a part of what was going on here i.e. the alcohol, the intoxication, dirty movies, et cetera. We don't have any of those kind of things here.

MR. HUSK: Your Honor, I can certainly follow any restrictions that the Court places regarding any of those other activities.

THE COURT: Let me ask this, Mr. Husk, have you thoughtfully prepared a limiting instruction that I would use?

MR. HUSK: Yes, Your Honor, I have.

THE COURT: Is that in the things you have given us?

MR. HUSK: Yes, it is the identical instruction that was used in the Todd case as well.

THE COURT: We have all those here?

THE CLERK: Yes.

THE COURT: We will look at that.

MR. TREBON: Your Honor, this isn't the position I [673] would like to advocate, but I would just like to throw it out before we leave for the evening.

If the Court is inclined, and I hope it is not, after taking a hard look at the applicable law and the nature of the prior bad acts, which involve sodomy, I'm sure the Court knows that they are all sodomy, they are not touching, they are all sodomy counts, that at least if—that it would allow, I think Travis Yazzie is a much more simple issue to deal with than Cory Kay. I don't know why we have to have them both.

Certainly one of them tends less to overshadow the case than the other.

THE COURT: I don't know—what are the circumstances of Travis Yazzie? I don't recall right at the minute.

MR. HUSK: Your Honor, actually the circumstances involving Travis Yazzie verify what Amadee Roy has indicated regarding the lotion and so forth.

Cory Kay will indicate regarding the lotion, the sodomies, so they are very related.

I think the Court has already allowed—placed some restrictions on the Government's use of that in limiting the Government to advocate, at least in its case in chief, the positions or the bad acts relating to those counts in the indictment only, not the additional counts that were contained in our original motion for prior bad acts.

There are other counts out there as well, Your Honor. [674] I think to cut it off arbitratily as Mr. Trebon would submit is completely inappropriate.

MR. TREBON: Your Honor, it is a way to balance the 403 balancing, that you allow—if you are going to allow some prior bad acts, you don't have to allow them all in.

It is a way to temper prejudice somewhere, if you get to the point where you deem they are admissible. Admitting some and not the others is a way to engage in a balancing process.

MR. HUSK: I would agree, Your Honor. My contention is that that has already been done by the Court with regard to those other acts.

THE COURT: Well, as I say, I would—

MR. TREBON: Your Honor, may I make one other suggestion?

That if the Court—it may be a bit unusual, but if the Court could reserve a decision about whether or not it would allow these prior bad acts in until after we put on our defense, and then the Court would be in a far better position to judge whether or not we have opened the door to intent or motive or whether or not we have actually held the line.

THE COURT: Intent and motive doesn't depend upon what you do really. It depends upon the record that is presented.

MR. TREBON: There will be that much more of a record then.

[675] THE COURT: Well, we aren't going to have any more of a record regarding Cory Kay or Travis Yazzie. We are certainly not going to have any more of a record about that.

What other things are you thinking about?

MR. TREBON: I just meant the record in the case will be further developed as to whether or not those 404(b) reasons really exist any more or don't exist.

THE COURT: Why wouldn't they exist?

MR. TREBON: Because our defense may not touch upon them.

THE COURT: I don't know—I don't know that your defense has to touch upon them, but you seem to suggest it would.

MR. TREBON: Yes. If they are not contested issues in the case, why present evidence about it?

THE COURT: You have presented evidence now that would lead the jury to believe that Mr. Hadley, for instance, is dealing with these younger people, taking them home, doing these things, that is kind of the Todd approach, that he was just helping them out, getting them a pair of pants, taking them home, stopping by his house, picking them up, moving them around, that is all—that is intent and motive evidence why he was dealing with them. Isn't it? That is your intent and motive?

MR. TREBON: We have only presented evidence relating [676] to specific incidents in question.

THE COURT: Pardon?

MR. TREBON: We have only placed evidence in the record relating to the specific incidents in question, not his general character for doing anything.

THE COURT: All right. Well, in any event we will be some time with Dr. Rosenzweig. He is our first witness tomorrow?

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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

(Caption Omitted in Printing)

TRIAL PROCEEDINGS

* * * *

[682]

Prescott, Arizona
May 5, 1989

PROCEEDINGS

THE COURT: Well, we are waiting for Dr. Rosenzweig, I assume, but before that, let me just briefly continue our discussion about prior acts, et cetera.

And, we spent some time last evening reading about those matters, and thinking about them. It seems clear that under Rule 404(b), that relevancy determinations can relate to a number of factors, including motive and intent, and it seems clear here that there are certain of the charges, at least, that involve intent or motive and they have to do, of course, with, among other things, Count 9, Count 11, and Count 10, at least insofar as there would be a lesser included offense there, having to do with the intentions or motive that Mr. Hadley would have had in touching the minor children.

And, intent, of course, is an element of 2244(a)(3). It specifically refers to with intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person.

And, 2245(1), includes the same reference with respect to intent. So, intent or motive is an element, I believe, with respect to those.

The prior acts that we were discussing and we will get [683] into a little bit of that discussion further, but

the prior acts have to do with alleged activities of Mr. Hadley, of a sexually gratifying nature. So I think those acts, prior acts, would be relevant in the jury's consideration, not necessarily limited to whether Mr. Hadley did the acts, but his purpose in doing them as well.

And, so that that evidence doesn't—isn't limited, its admission would not be limited in the sense of the cases to simply showing that Mr. Hadley had bad character or criminal propensity.

Obviously, if Mr. Hadley was allegedly a homosexual and robbing a bank or stealing a car, that, in absence of some other circumstance clearly wouldn't relate to his intention or motive.

In deciding whether or not a prior act or other acts should be admissible, the similarity of the prior acts is a relevant consideration, i.e., the illustration as we discussed, the difference between a sexual act and a bank robbery, for instance.

And so one of the considerations then as to whether or not intent, motive, plan, would be overshadowed by the contention that its purpose was simply to show the propensity of the testimony to prove only criminal disposition. Under appropriate circumstances, I don't think it would.

And, of course, the cases tell us that in making the [684] 403 evaluations, or judgments, that is essentially whether or not the probative value of the evidence outweighs any prejudicial impact, there must be clear and convincing evidence of those other acts before they would be admissible.

Here, of course, there are a number of circumstances that arguably, if they had occurred before, would be relevant, I believe, and admissible, giving consideration to the 403 weighing, driving, sitting on laps, sit on my lap, going swimming, going home, getting the child into his house under some ruse, lotions, things like that.

And up until now, really, and I know we tried to approach it yesterday, after the jury was excused, I

really don't believe that there is any basis for me to make a clear and convincing determination.

I think that the nature of those activities would have to be shown specifically by some detailed offer of proof or by some testimony, so that the record would be clear and could be reviewed in that respect.

I would also believe that if any evidence is going to be admitted of those prior acts, then we would have to screen, or sanitize, I suppose, as much as possible, that evidence, so that, for instance, it simply wouldn't show the alleged activities of Mr. Kay on one evening that are in three of the counts, I think, or things like that.

So, it would have to be presented in some way that the [685] gross nature of the other acts simply wouldn't be so prejudicial as to inflame the jury.

So, those are my thoughts on it, how I perceive it and, of course, the Government can take what actions that they want to act or request, this is also an issue, of course, that can be considered now and evidence arguably could be permitted now, and I think in light of some of the cross-examination of witnesses by Mr. Trebon, that there are certain implications through that questioning.

One, having to do with Mr. Hadley's interest in children, his willingness to help, in a sense his neighborliness or school teaching character, the suggestion that the lotion involving Amadee Roy was simply a post swimming skin tone, things like that, are all there before the jury and have been put in for that purpose.

On the other hand, of course, the matter could come up, through rebuttal, and through any evidence that would be presented by the defense, that this evidence might relate to.

So without some further showing or record with respect to the clear and convincing and what it is, specifically, that we would be sending to the jury, apart from the gross acts described in the—in the first counts that have been severed, I would not find a basis for admitting those kind of facts, so that is where we are.

MR. HUSK: Your Honor, the Government is prepared to go [686] forward with—our preference would be to submit to the Court the FBI reports concerning the testimony of Cory Kay and Travis Yazzie.

I really don't think that there is any dispute as to what these individuals will say. I think that everything that has been said has come out and there is really no surprises. I would be prepared to submit those reports to the Court for consideration and then, certainly abide by whatever the Court's preference is, as far as sanitizing those statements and what areas we can get into.

It would be my preference to follow that procedure, particularly since that is not in dispute although there certainly is impeachable material there, but I would not—my preference would be not to go through another hearing just on those, although if that is the Court's preference we would be prepared to do that as well.

But I think to allow two—or to require these people to testify basically twice, would be inappropriate. Again we will follow that. The Government is prepared to go forward with whatever procedure the Court wishes to follow. We would like to do that as part of our case-in-chief.

THE COURT: Well, as I say, I'm not so much interested in the details of the final events as I am, seems to me the relevancy of the predicates, or any actions or procedures leading up to the final events, insofar as these people are [687] concerned.

It seems to me that is the consideration I should have.

Pardon me, Mr. Trebon.

MR. TREBON: Your Honor, two things, I don't think that submission of the FBI reports would allow this Court to make any conclusion about whether or not the evidence is clear and convincing.

I did think that there may be more surprises than Mr. Husk is anticipating. I don't think the evidence is as clear as he seems to say today.

Second of all, I was wondering if the Court, since this evidence is being apparently admitted to show sexual

intent, what if we stipulated that if the private parts of these individuals were in fact touched, that it was with a sexual intent.

And then simply have the issue about whether or not it occurred go to the jury. And that way we would officially eliminate that issue.

THE COURT: Well, you can discuss that with Mr. Husk. I would not require him to do that.

MR. HUSK: I would not be prepared to do that.

THE COURT: Let's do this, what I would prefer, at least initially, is the Government to specifically tell me what it is that someone is going to testify about as to the—lead up into these things.

[688] I don't want to read all about what happened on the dining room floor. I want to know how they got on the dining room floor and were they invited over, all of the evidence with respect to drinking and carousing, we don't have any of that kind of testimony here.

We don't have any testimony in this case about watching dirty movies, or things like that. I am interested in what I think would be persuasive, for my purposes at the moment, would be evidence about taking rides, getting on my lap, come over, let's go swimming, here is a little lotion, a pinch and a poke and the first thing you know it is go. That is what I am interested in, I think what the record is interested in, insofar as predicate to admitting evidence of other acts.

MR. TREBON: Your Honor, I think it is fair to say that none of the other cases do involve rides in cars or sitting on laps or any things like that, I think Mr. Husk would agree with that.

MR. HUSK: I can tell the Court specifically, if the Court wants me to.

THE COURT: Let's at least pass on for the moment. Where are we now? Do we have any other witnesses right now?

MR. HUSK: Your Honor, we would only have Dr. Rosenzweig, because the rest of the witnesses would relate to these particular acts.

THE COURT: Dr. Rosenzweig will otherwise be your last [689] witness?

MR. HUSK: Yes.

(Counsel confer off the record.)

MR. HUSK: Your Honor, one of the other factors, is there is a statement from Mr. Hadley, as the Court will recall that was the subject of the motion to suppress.

And, that statement would obviously be offered at some point in time. But that statement dealt with Cory Kay. And so that is another factor that would have to be considered. I think there was a complete denial as to the other counts, but he—there was I guess arguably a concession regarding Cory Kay.

THE COURT: I think I said that the statement, I ruled before that the statement wasn't voluntarily made. And I don't believe I ruled that it was going to be admissible at the time of trial.

And I don't think that that statement, in the context of these counts would be admissible, except insofar as it might then come up by rebuttal or something else, depending upon what might occur insofar as Mr. Hadley's nature, activities, propensities would be concerned.

MR. TREBON: Your Honor, that brings up another issue and maybe I should address it with the Court now, because I happened to be reading an evidence book last night and saw it.

Even if this Court determines that acts involving Cory [690] Kay would be admissible under 404(b), there is a different standard, and in this case I believe a far tougher one, as to whether or not—in fact, I think it is a matter of evidence, it is simply not admissible to cross-examine Mr. Hadley about it under 608.

In other words, it's not anything that resulted in a conviction, therefore I don't believe that Mr. Hadley could be cross-examined by the Government about the prior bad act involving Cory Kay.

THE COURT: I'm not getting into Mr. Hadley and whether he is testifying, because obviously he's not going

to testify in the Government's case. And all I'm interested in now is the Government's case. I will certainly consider that over the weekend.

MR. TREBON: It is something that I will try to brief over this weekend. And if the Court is willing, would ask for some kind of a ruling to guide me, before I put Mr. Hadley on, if we come to that point.

But it's a very—you know, it is an interesting evidence question that I thought the Court might want to be aware of.

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[879] MR. HUSK: And do I understand the Court's ruling with regards to cross-examination of Cory Kay that at this time he can only be cross-examined as to any prior conduct with the defendant and not anyone else?

THE COURT: Well, let me say this, I don't know that I have said that. I will—we will take a few minutes and I will read this amendment to Mr. Kay and if we don't admit it now in the Government's case-in-chief, of course, there is always—then it could be considered further in connection with any evidence presented by Mr. Trebon.

MR. HUSK: Okay.

MR. TREBON: Your Honor, I just want to comment on the [880] offer to stipulate. The offer to stipulate doesn't need to read that if these things happened such and such. We are willing to stipulate that any of the acts that are alleged in the indictment, to the extent that they occurred, obviously I don't want to have a stipulation that we admit that they occurred, but to the extent that they occurred, that they occurred, because of the intent required by the statute and for purposes of sexual gratification. We are willing to stipulate to that.

And, other than propensity I can't see the relevant purposes of admitting the stuff at this point. The intent statute is going to be satisfied. It is really the kind of acts that in and of themselves raise the inference of intent anyway.

You don't touch someone else's penis for some other purpose, unless you are a doctor, than sexual gratification, but to the extent that that is not inferred from the act itself, we are willing to stipulate that that would be the requisite intent, satisfied by the evidence in this case.

And for that reason I believe that the prior bad acts evidence is simply irrelevant and ill advised, in light of the overwhelming amount of prejudice that it is going to cause.

And I do think that it is a trendy area in the law. The Second Circuit is now—clearly allows the defense to

take the issue of intent out of the case, if they are willing [881] to so stipulate.

The Ninth Circuit, in the McCoy case notes the Second Circuit's position in the footnote. Doesn't resolve it in the McCoy case at all. A couple of other cases that are cited on page six in my memo are cases in other circuits now too that are starting to discuss that issue and give it some credence from the Second Circuit as well, so I believe it is the fairest way to deal with the issue.

And if it hasn't come in the Ninth Circuit, I think that it will. It is the fairest way for this Court in this case to deal with the issue, to allow us to make that admission and move on the case without causing any further prejudice.

Certainly the Government can't be hurt if the intent condition of the statute is met by our admission. I don't know how that could hurt them. There has already been three acts before the Court, essentially they have had prior bad act evidence, because there is three different victims in several different counts already before the Court. That ought to be enough. They ought to have to prove the acts occurred that are charged in the indictment at some point without ruling on propensity.

We are willing to stipulate on intent and I think that should be enough.

THE COURT: Well, I will look at McCoy and several of [882] these other cases.

As I say I, at this stage at least in this Circuit, I suppose I can try and judge what the circuit will do and I can also judge at some time what I think the Supreme Court will do.

All right. So, how are we doing on our jury?

THE CLERK: Half of them are here.

THE COURT: Half of them are here.

All right. Well, let me say one other thing also with respect to Mr. Kay. We were perhaps in a more informal mode Friday afternoon. I think you should advise Mr. Kay that he should answer questions directly and not volunteer any comments or quips with respect to activities or "If you really want to know, ask Mr. Hadley," or something like that, that we had during the trial—or during the Friday afternoon session. Okay?

MR. HUSK: Certainly.

MR. TREBON: Thank you, Judge.

(Whereupon a recess was taken.)

THE COURT: All right. Just a couple more things before we have the jury in. Although I noted it on Friday, specifically, I have given consideration to the purposes of Rule 404(b), and also Rule 403.

With respect to 404(b), the evidence with respect to prior bad acts involving, in this instance, Mr. Kay are [883] relevant, the evidence goes to the motive and intent of Mr. Hadley, as well as whether there were any particular plans or preparations having to do with his conduct in these kind of activities and whether that, in this instance or these instances before the jury, were similar to those on other occasions.

And it seems to me as well that that is the reason why the stipulation proposed by Mr. Trebon wouldn't be reasonable or appropriate under all of the relevant circumstances in this case.

The evidence having to do with prior bad acts, how they were allegedly undertaken and carried out, the probative value of that evidence outweighs any unfair prejudice to the defendant. There is a similarity of the acts. The considerations reflected in Huddleston, that evidence could also be considered as corroborative of the testimony of other witnesses.

So for all those reasons I have concluded to admit the evidence of prior bad acts related to Mr. Kay.

The stipulations proposed by Mr. Husk—or by Mr. Trebon, pardon me, do not unequivocally, in this instance, remove any intent or the other relevant factors under Rule 404(b).

With respect to—we have discussed aspects of Mr. Kay's sexual activities with other people by way of [884] cross-examination, more particularly with respect to Mr.

Trebon's suggestion, at least, that he had had witnesses from the Navajo Tribal police agency having to do with their opinions about the charges, or allegations that had been made by Mr. Kay.

I have already ruled that any of that evidence would first be argued before the Court, before it is presented in open court before the jury and brought up in that fashion.

I would think however that to the extent that Mr. Trebon might conclude to get into such an area, that he could bring out if he desired to, through Mr. Kay that Mr. Kay may have made charges against Mr. Hadley or others, for that matter, I suppose, and had then withdrawn them, and the Government could then, to the extent that Mr. Trebon didn't, go into why those charges might have been withdrawn.

Now, that brings us to the other point that I didn't discuss, having to do with a possible limiting instruction.

What is your thought on that, Mr. Trebon?

MR. TREBON: Your Honor, if I may first briefly comment on a couple of things that were raised by the Court. I don't know how the stipulation doesn't unequivocally admit intent, but we would be willing to change it so that it does so to the Court's satisfaction, if that is a problem.

• • • •

[1338] [VERL HADLEY]: Most of the students I knew in Kayenta were high school students.

Q. MR. HUSK: I understand that, but that wasn't my question. My question said between the ages of 10 and 15, have you ever provided rides to those students where you just went cruising around Kayenta in your car?

A. I don't believe, no.

Q. So if there were students within that age group that said that they had—

MR. TREBON: Objection, Your Honor, may we approach the bench?

THE COURT: Certainly.

DISCUSSION AT BENCH

MR. TREBON: Your Honor, I object because these questions are irrelevant, number one. Number two, there has been no testimony from anyone in Mr. Husk's case or during our case that there are rides provided to students at the school and if he is trying to set up impeachment on a collateral matter, I object to that, because those would be other bad acts that he's never sought in his motion to introduce and weren't introduced yet, so far. I object if they are introduced, if they come later, but to ask Mr. Hadley about them now to—it's collateral, I think they are irrelevant to ask Mr. Hadley now.

[1339] THE COURT: I don't understand that line of reason.

MR. TREBON: There has been no testimony from any of the witnesses.

THE COURT: Why would there have to be? He can ask this man first, can't he?

MR. TREBON: To get a denial simply so he can—no, I don't think he is allowed to ask this witness matters that have nothing to do with this case, just so he can bring in witnesses at a later time to try to impeach him on a collateral matter.

THE COURT: Whether it would be collateral or not, seems to me it has relevance and he is entitled to cross-examine him about matters that are relevant to all of these discussions that we have been having and he brought out incidents involving that. You brought up the Thriftway Store. I think also every time he answers a question "I don't believe so," Mr. Husk is entitled to pursue him. That is not an answer. And he did that repeatedly with you.

MR. TREBON: His answers—his question is vague as well.

THE COURT: Well, in your questions he said innumerable times "I don't believe so."

MR. TREBON: Well, we are here on his objection—my objection to his question now.

THE COURT: Your objection is overruled.

[1340] MR. TREBON: The question is vague about whether or not—what time is he referring to?

THE COURT: Find out whether this was this age, that age, or whatever.

MR. HUSK: Certainly.

THE COURT: All right, let's proceed on.

(End discussion at bench.)

Q. BY MR HUSK: I believe you testified that you have not ever provided rides to children from the Thriftway Store around Kayenta within the age group from say 10 to 15 years of age. Was that your testimony?

MR. TREBON: Your Honor, I object to foundation as to when this incident took place.

THE COURT: This is ever and then we can—

MR. HUSK: I will narrow it down.

THE COURT: Then we will pursue it further.

THE WITNESS: I might have on certain occasions, dropping them off at their home or something of that nature.

Q. BY MR. HUSK: Okay. So earlier when you said that you did not, that was not accurate; is that correct?

MR. TREBON: Objection, Your Honor, asked and answered.

THE COURT: His answer before was "I don't believe so," so let's proceed on.

Q. BY MR. HUSK: Have you ever had any of your current students over to your home?

[1341] MR. TREBON: Objection, Your Honor, as to particular persons involved.

THE COURT: Well, rephrase the question, because we are going to get into quote "current students" and we know he is not teaching.

Q. BY MR. HUSK: Have you ever had any minor male students between the ages of 10 and 15 years of age over to your house as a guest?

MR. TREBON: Object as to relevance.

MR. HUSK: It's irrelevant?

THE COURT: Well, now, both of you. Now I'm the one that makes the rulings. The objection is overruled.

MR. HUSK: Thank you, Your Honor.

Q. BY MR. HUSK: Did you understand my question?

A. Repeat it, please.

Q. Have you ever had any minor male students between the ages of 10 and 15 years of age over to your house as guests?

A. Well, my nephews are in that age range, yes, they would come over.

Q. Have you ever had Amadee Roy over to your house?

A. No.

Q. He's never been to your house?

A. No.

Q. Have you ever had any people, other than relatives within that age group over to your home?

[1342] A. No, I don't believe so, no.

Q. Have you ever provided alcohol to any minor students at your home?

MR. TREBON: Objection, Your Honor.

THE COURT: Overruled.

MR. TREBON: My objection is relevancy grounds.

THE WITNESS: I confine my use of alcohol to those persons who are 18 or over.

Q. BY MR. HUSK: That wasn't my question.

Have you ever provided alcohol to students that are minors under 18 years of age—under 21 years of age?

A. No, I don't believe so, not in my home.

Q. Have you done it anyplace else?

A. No.

Q. Isn't it true, Mr. Hadley, that you have a reputation for touching some of the male students in your classes?

MR. TREBON: Objection, Your Honor, may we approach the bench?

DISCUSSION AT BENCH

MR. TREBON: Your Honor, I think the record should show my strongest objection to all of these matters. This is a character assassination. If he's going to prove him guilty of something that is supposed to be the charges in the case, not did you do this or that, no.

THE COURT: Do you think, Mr. Trebon, he's confined to [1343] asking him whether he had sex with X? I don't think so. I think he is entitled to go into all these matters, particularly in view of your examination and his answers that would paint himself as something who doesn't do any of these things and hasn't done any of these things and they are all relevant insofar as his activities are concerned with these students and whatever.

MR. TREBON: And especially the reputation thing. That is strictly character, strictly forbidden by 404. He can't ask him—

MR. HUSK: He puts his character in issue when he takes the stand.

MR. TREBON: For truth and veracity alone.

THE COURT: I think any character trait is irrelevant, but in any event—

MR. HUSK: My particular angle, Judge, is he brought out through his witnesses that this man never touches any students, people.

MR. TREBON: I have?

MR. HUSK: You had witness from the school that said they never saw that.

THE COURT: Are you going to have somebody say that that is his reputation?

MR. HUSK: Yes, I am.

THE COURT: I will overrule the objection.

[1344] MR. TREBON: Let the record show not only my objection, I believe that it violates the rule on character and I believe that it turns the case into a character assassination case. In the event the stuff comes in, I move for a mistrial. And I would like the record to show a continuing objection.

THE COURT: You make objections as you consider it appropriate, but I would do it less obstreperously. It looks like you are going down for the 9th count, so just object and if you want a side bar, come up. We are not in final argument yet, so save it for those times.

MR. TREBON: All right.

(End discussion at bench.)

Q. BY MR. HUSK: Isn't it true, Mr. Hadley, that you have a reputation for touching the male students in your classes?

A. Could you define touching, please?

Q. Sure. Isn't it true that you have a reputation for tickling male students in the chest area?

A. I believe in a playful manner, or if I am instructing in a classroom.

Q. Mr. Hadley, I asked the question, if you would just restrict yourself to answering that question.

A. In a playful manner.

Q. And isn't it true that you also have tickled students in the back area?

MR. TREBON: Your Honor, I object on relevancy grounds. [1345] I would like the record to show a continuing objection, so that I don't have to object to each question.

THE COURT: Well, with respect to touching in the back you can have a continuing objection. Anything else we will discuss as we go along. The objection is overruled.

Q. BY MR. HUSK: You also tickle—have a reputation for tickling students in the back area; isn't that true?

A. In a playful manner.

Q. Isn't it also true that you have a reputation for tickling students in the thigh area?

MR. TREBON: Same objection.

THE COURT: Same ruling.

THE WITNESS: In a playful manner.

Q. BY MR. HUSK: Do you think it is appropriate behavior for a teacher to tickle his or her students even in a playful manner?

MR. TREBON: Objection, irrelevant and argumentative.

THE COURT: Overruled.

THE WITNESS: Certainly not in the classroom. However, outside on the playground where there is a less restricted area, I think it is appropriate.

Q. BY MR. HUSK: Mr. Hadley, you testified that you were the acting principal for a period of time; isn't that true?

A. Yes, I did.

* * * *

[1353] Q. Did you allow any other students to drive your vehicle?

A. No.

Q. You never allowed any minor students to drive your vehicle, any minors, any people that did not have a license?

A. No.

MR. HUSK: Your Honor, may we approach the bench?

DISCUSSION AT BENCH

MR. HUSK: Your Honor, I have here a list of citations received by the defendant. One on 5-19-1976 in which he was cited for allowing an unauthorized person to drive his vehicle. The Government is prepared to present the witness—the testimony of the Department of Public Safety officer, who [1354] provided that citation, who will indicate that the person driving that vehicle was a minor and that he was so cited. I would ask at this point in time the opportunity to impeach the witness regarding that, based on his assertion.

MR. TREBON: Your Honor, number one, he needs to have a certified copy of a conviction.

MR. HUSK: Not for impeachment. I can ask him.

MR. TREBON: You can ask him if he was convicted, but he has to stand by the answer. I don't think you have to show the piece of paper.

MR. HUSK: I am prepared to do that, or certainly allow—or to rely on the officer coming in to testify later on.

MR. TREBON: That doesn't indicate it is a minor person, so I would object to him showing him that particular document.

MR. HUSK: I can ask him the question, I believe, Your Honor.

THE COURT: Well—

MR. TREBON: I also think that this again is a collateral issue, that under 403 is confusing to the jury, they are not particularly pertinent to any issue in the case.

THE COURT: Was he in the car or any of those kind of things?

MR. HUSK: Yes, he was.

[1355] THE COURT: On that occasion?

MR. HUSK: Yes, he was.

THE COURT: Well, since it's in the nature of the same kind of acts, so forth, I think it may have some relevance, so I will overrule that objection. But you avow, Mr. Husk, that you have a witness who will come now and with the records and be able to establish that, when it happened, and that that—and the details of it by certified copy of the police records?

MR. HUSK: I'm not sure I have certified copies of the police records, but I have a copy of the citation. The officer can recall distinctly Mr. Hadley. He will be able to identify Mr. Hadley, will be able to indicate he gave him the citation on that date, and describe the circumstances under which it was issued.

MR. TREBON: I don't believe that that is probative. You are not allowed to bring in extrinsic evidence for impeachment.

THE COURT: I think for the defendant it may be true—or for a general witness. I think I have allowed it here. But where you get somebody that is even a percipient witness, important witness, I think you can bring in extrinsic evidence. You know, it is—it happens regularly, for instance, where there is a government informant, they impeach them on everything from the kitchen to the sink.

MR. TREBON: Your Honor, unless he's got a conviction [1356] document, certified copy of a conviction, then I would object to having a DPS officer coming to testify about the fact of the case.

THE COURT: The DPS officer can testify that he stopped him, what he saw, what he observed, so forth, so I will overrule the objection. All right.

(End discussion at bench.)

Q. BY MR. HUSK: Mr. Hadley, isn't it true that on May 19th of 1976, in the Monument Valley area, you

were stopped by an Arizona Department of Public Safety officer and cited for allowing an unauthorized person to drive a vehicle and that person was in fact a minor; isn't that true?

A. That's true. I understood the question—I understood the question previously that I thought you were making a reference to my students at Chilchinbeto Day School.

Q. Who was that person that you were allowing to drive the vehicle?

A. I believe the kid's last name was Vanarsdale or something like that. Vanarsdale or something. It's been some time I don't remember his first name.

Q. Was he a relative?

A. No.

Q. Had he been asking to drive your vehicle?

A. Excuse me?

Q. Had he asked you to drive your vehicle?

* * * *

[1397] THE COURT: No. Laverl, L-a-v-e-r-l. That's not correct?

MR. HADLEY: That's not correct.

THE COURT: Bridget said he said "Ah, Verl." I have to erase my credit. All right.

MR. HUSK: Your Honor, the reason why the Government requested this opportunity to discuss this outside the presence of the Court—or outside the presence of the jury, not the Court, is that the Government has various witnesses, who are minors, who are former students of the Chilchinbeto School, who would come in and testify to the fact that: One, they have either seen the defendant touch other students; two, to have been touched by the defendant themselves; and three, can attest to—and I guess I should define "touch." Touch being everything from tickling to squeezing the thighs to attempting to touch the genital area over the clothing.

The Government further has a couple of witnesses that will testify regarding the fact that they too have been

at defendant's residence in Baby Rocks and that while there, the defendant showed video movies and was involved in rubbing the back and the neck area of these minors.

I think those are the first issues I would like to take up with the Court. There is one other matter as well.

But it is the Government's contention, Your Honor, that based upon the defense testimony and the testimony that has [1398] been elicited during the defense's case regarding the fact that the defendant has never been seen touching students, that this information is relevant and under 404(b) is admissible to show common plan and scheme, motive, preparation and intent.

MR. TREBON: From the outset of this case we have consistently stated that intent was not an issue. Our defense in this case, I believe the record will show, has consistently been that the acts did not take place.

I asked Mr. Hadley point blank with respect to all of the students that were involved in this case in terms of the indictment, whether or not he touched them on those particular occasions. He said that he did not.

He never said that he touched them, but that he wasn't intending to touch them in a sexual way. Never said that he pulled down their pants, but he didn't mean not to insert his penis. Nothing like that was ever said.

THE COURT: But the jury—we have gone through that point, at least, Mr. Trebon, and the law is not so unsophisticated, that someone can deny doing an act and not have evidence presented with respect to a plan, or circumstances of doing those acts and what the purposes of those would be.

And so if he touched other people and then did other things, it has to do with the intent with which he touched these people, if they find he touched them. And I'm not going [1399] to go through that exercise again.

MR. TREBON: The—

THE COURT: I'm not saying this evidence is admissible now, either, but I am simply saying that argument just doesn't wash as far as I am concerned in a case such as this.

MR. TREBON: The other point I want to make, the reason I pointed it out again now, Judge, is that it is no longer a matter of what we propose to do. I think it is a matter of what we have done on the record.

Second of all the Court has already allowed—there are three counts that have been tried together, three counts of a similar nature that were tried together, so the jury already has three acts of touching. If they decide that the touching takes place, I don't believe it's going to be hard for them to conclude what kind of touching this might have been, if the touching in fact occurred.

I think the critical question and the only real question, based upon this record, is whether or not the touching occurred with respect to these three individuals.

If the Court allows other bad act evidence, the problem is, it tends to show propensity more and more. Doesn't show whether or not these particular incidents took place. There is no real contention, I don't believe after Cory Kay's testimony and after all three of these people being tried together, You know, what the intent is. I don't think it's [1400] become more of an issue as we put on the case, so the Court should allow more prior bad act evidence in.

In fact Mr. Hadley testified that yes he often does tickle the children.

THE COURT: I guess all of these cases, as we say, they don't necessarily be consistent, you put on enumerable witnesses that apparently never saw him doing any of those things so,

MR. TREBON: I never asked any of those witnesses whether or not Mr.—they believed that Mr. Hadley's character was such that he wouldn't do these things.

THE COURT: No. You asked them did he touch anybody and they never saw him.

MR. TREBON: Right. With respect to individual witnesses. I never put on any character evidence in this case.

THE COURT: I can understand that.

MR. TREBON: Your Honor, the other thing that—I just think that there has to come an end, hopefully, under 403 analysis as to just how much the Court is going to allow. Three acts tried together and a prior bad act involving sodomy in a case of this kind is enough, I believe, for the jury to consider.

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[1404] MR. HUSK: Your Honor, the other issue is a much more serious issue, and I call that to both the Court's attention as well Mr. Trebon's attention.

Last night the Government was contacted by the FBI in Cortez, Colorado and they indicated that a person there by the name of Kyle Hartman, based upon a lead that had been sent out some time ago was available, was interviewed and indicated—first of all Mr. Hartman is now, I believe, 20, in his mid-20's. And he indicated that he, while he was a fifth grade student at Chilchinbeto High School had been sodomized by the defendant, Verl Hadley.

The Government did not have that information until just [1405] last night. We have requested that Mr. Hartman be brought here. He's on his way here and based upon secondhand information, although I do not feel comfortable providing a lot of detail at this time to the Court, but it is our understanding that a lot of the similar procedures that have come out in this case, in our case-in-chief, were utilized with regards to Mr. Hartman.

And again I call that to the Court's attention and as soon as I have more details I will be happy to provide those to the Court and I should have those later this afternoon.

THE COURT: Not only to me. I don't know that I'm necessarily the one that that needs to be directed to now. I would think more to Mr. Trebon, and discuss those matters with him and I would think, based on the circumstances, it would be appropriate, if Mr. Trebon requests, for him to interview the person.

MR. HUSK: Absolutely.

THE COURT: And then we would be in a position to discuss it in some meaningful way.

MR. TREBON: Your Honor, I have the same problem with this. Is the Court indicating that after it's allowed already one prior bad act as to sodomy that it would allow another one in this case?

THE COURT: All depends on what it is and what the circumstances were.

[1406] MR. TREBON: Of course, he's now in his 20's and he was in the fifth grade, we are referring to something that is well over 10 years ago.

THE COURT: Well, I don't know. Until I know more about it I'm not making any rulings now. All I am telling Mr. Husk is he can talk to the person. He can talk to you about the person. You can interview him if you want to, and then before we bring the person in before the jury we will discuss it further and in some specific detail.

MR. TREBON: Of course, this is something we have to investigate as well. I mean that could be the subject of a whole case. I would be very fearful of pretending that I could interview this person and be prepared to cross-examine.

THE COURT: You can tell me or explain to me why that might be so and what investigation would be needed and et cetera.

MR. TREBON: All right.

THE COURT: I am just hearing about it now like you are.

MR. TREBON: I know, Your Honor. The other thing, of course, I know the Court is aware of it, but just to verbalize it is that this case has been pending for a long time, they superseded once already.

THE COURT: Well, it hasn't been pending a long time, because of my problems.

[1407] MR. TREBON: I know, Your Honor. I'm certainly not saying that, because of my mine, no doubt, we needed a lot of time to investigate this case. I am

very pleased that the Court gave us this time and I think it is evident and if it is not, we did a lot of investigation, we worked hard on the case. It was not a case that was easy to investigate. It took a lot of trips to even find a person sometimes.

The Government has had equally that amount of time or more to investigate the case and it shouldn't come down to the last wire with major breakthroughs like this in terms of new witnesses, new acts, that would be unfair to everyone, including the Government, who hasn't had—who is caught in the throes of advocacy as we both are before the Court at this time, to put on evidence that hurriedly without greater inspection.

THE COURT: Well, if it appears that it is necessary and greater time is necessary, then I would entertain a delay for those purposes as well. All I am saying is, I don't know anything about it. Mr. Husk seems not to have talked to the individual. The person is arriving this evening?

MR. HUSK: Yes, it is my understanding, he should be here approximately 4:00 o'clock.

THE COURT: Then we can take it up, but we are going to take it up out of the presence of the jury.

MR. TREBON: The other thing that I feel I should [1408] mention is not just a matter of whether or not a delay would allow us further investigation.

Based upon Mr. Husk's motion, based upon the hearing the Court held out of the presence of the jury last week, we put on a defense knowing what the Government's case was supposed to be. At some point you have to be able to plan your defense and base it upon a fair chance to review the facts before trial and before you put on evidence, and not in the middle of it, and that would be impossible now with respect to—

THE COURT: I don't know whether it would or wouldn't until we find out more about it. You discuss it with your client, et cetera. I don't know. I would—and then I will hear all of those matters.

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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF ARIZONA

(Caption Omitted in Printing)

TRIAL PROCEEDINGS

* * * *

[1428] THE COURT: Well, let me ask, those names, have they previously been disclosed to Mr. Trebon.

MR. HUSK: Yes, they have.

THE COURT: Well when?

MR. HUSK: The witnesses at the beginning of trial, Your Honor.

THE COURT: But specifically several months before trial or when these other folks have been identified, they were not identified to the extent of any demands by Mr. Husk or the bill of particulars, or anything like that?

MR. HUSK: No, Your Honor, because they were not contained in the indictment and the Government did not think—

THE COURT: You had a motion for prior bad act evidence?

MR. HUSK: Right. They were not contained in that motion and that was primarily because the Government was not certain that it would be relevant unless the defendant took the stand and made the denials, which he in fact did make.

And, it was at that point that the Government contends [1429] they become not only relevant, but crucial to the Government's case.

THE COURT: Well, those matters were known—have been known to the Government then for some period of time, those two people?

MR. HUSK: Yes, Your Honor.

THE COURT: All right. Well, it's five minutes of 9:00. We asked the jury—they are here at 9:00.

I think maybe what I will do is just do a little studying until 9:30 and then we can see what we want to do and if we want to take some time to talk with Mr. Hartman, and also, Bridget, if you would type up just that several questions that I mentioned, which was shortly—it was after 11:40, so that it will be right around lunch time, according to my notes. All right.

And if you would then tell the jury that I am—that we have some matters that I have to consider and therefore that they are at liberty until 9:30. We will just walk over there. Okay?

(Whereupon a recess was taken.)

THE COURT: Refresh my recollection about some of our pretrial matters.

The Government gave a notice, as I recall, under Rule 12, that it was going to use certain specific evidence along these lines; is that correct?

[1430] MR. HUSK: That's correct, Your Honor.

THE COURT: And, was there ever any motions made under Rule 12, however it is, 12(d)(2) or (3) with respect to the defendant, Mr. Trebon?

MR. TREBON: I'm not sure what the Court's question is.

THE COURT: Well, look at—do you have the criminal rules there?

MR. TREBON: Yes, Your Honor.

THE COURT: Yeah.

MR. TREBON: With respect to an alibi defense?

THE COURT: No. It is before that. Look at Rule 12 before that, it is confusing.

MR. TREBON: Oh, I'm sorry. 12(2)?

THE COURT: No. Just look at Rule 12.

MR. TREBON: All right.

THE COURT: And then paragraph (d).

MR. TREBON: (d).

THE COURT: And then (2), "At the request of the defendant."

MR. TREBON: Yes, Your Honor. I did send a discovery letter requesting exactly the materials listed in the rules set by the Court, which was Rule 12(d)(2), that was a letter to Mr. Husk on February 21 of 1989.

And I believe it was sometime around then that Mr. Husk filed the 404(b) motion, although I don't remember the exact [1431] date of that now. If I can find it. The motion in limine filed by the Government was actually earlier, but that was filed on November 7th of '88.

THE COURT: Well, my understanding, perhaps I am wrong, apart from Rule 16 and Rule 12, to the extent that the Government gives notice of an intention to use certain evidence, Rule 404—Rule 404 does not require the Government to give any notice of an intention to use this kind of evidence, does it?

MR. TREBON: I don't—it is a question I haven't looked at, Your Honor. I know that the Government did give such an intention in this case.

THE COURT: Well, and I think in a sense these kind of issues that we are talking about here are somewhat different again, because the Government's knowledge of this evidence with respect to this gentleman, seemingly, at least, by Mr. Husk's statements came to light just recently during the course of the trial.

You have also had—the court reporter gave you, I take it, Mr. Trebon, a copy of seemingly the questions that I had in mind?

MR. TREBON: Yes, Your Honor.

THE COURT: Anything further on your part, Mr. Husk?

MR. HUSK: Your Honor, I just wanted to add that the Government did comply with Rule 12(d)(2) in that notice was [1432] provided as to those acts which the Government intended to use in its case-in-chief as cited by the rule, not that—the rule does not require any notice for rebuttal, in view of the fact that obviously a lot of that cannot be determined.

The notice was provided, although it certainly did not have to be provided, and any notice for rebuttal purposes is clearly not required.

THE COURT: Well, and I would propose at some time to take the testimony, or have the witness testify, so that we will know something more about what he's going to say. And, in that respect, perhaps to even defer the taking of his testimony, if it is going to be taken, until Tuesday.

MR. HUSK: That would be acceptable. I think for our purposes, Your Honor, perhaps if we could, at least if the Court could hear that testimony today just for the purposes of working through the weekend and seeing exactly what we are talking about. I think it would be beneficial, not only to the Court, but I'm sure to defense counsel and to the Government as well.

THE COURT: And then we can consider anything further that Mr. Trebon might want to proffer about that. I think in view of the specific assertive denials, emphasized denials of Mr. Hadley, about these kind of matters, that the testimony of this witness, if nothing else, would relate to impeachment or possible impeachment of Mr. Hadley insofar as he appeared as a [1433] witness or did appear as a witness and specific denials with comments such as this.

What I would like to do is proceed with the other evidence that we have, excuse the jury when we have everything else except this issue and then come back Tuesday morning.

MR. HUSK: Your Honor, in regards to the Court's comments too, I would add and call the Court and counsel's attention to U.S. versus Stockton 788 F.2d 210, cert. was denied in 107 Supreme Court 147.

And in that, it—Stockton, in a footnote, discusses extensively Rule 404(b) not being—the other purposes listed in Rule 404(b), not being exhausted and included in those other purposes is a purpose for impeachment and there is case law to that effect cited in that particular case.

THE COURT: Without agreeing to whatever conclusion I may come to, Mr. Trebon, is there any objection then to, this morning, then you are proceeding with the other—are the other witnesses available, the ones from California?

MR. HUSK: Yes, sir—oh, I don't know.

MR. TREBON: Arnold Charley is supposed to be here this morning. I don't know where he stayed last night. We haven't seen him this morning.

We do have one other witness that is here this morning that I would like to call, that would be Sergeant Laughter, to get in the statement that Mr. Hadley made to him in 1985.

[1434] I could put him on as surrebuttal as well, I did have one another witness in surrebuttal that I would be offering and that would be someone—it is in anticipation that Mr. Schafer will be called. And it was someone else who was a participant in a conversation with Mr. Schafer, but—and could put Laughter on surrebuttal too, that would be fine with me.

MR. HUSK: I have no objection to him going with Mr. Laughter at this point, I think it is a very quick witness.

THE COURT: Let's do that. Let's find out where these other people are and get them in and testify this morning. You have your investigator, let's get them down here and have them testify. And then, have the Government's other witnesses and then we could resolve—

MR. TREBON: Sure.

THE COURT: —or discuss this issue further, or give you whatever opportunities you want to take over the weekend with respect to it.

But, given the testimony of Mr. Hadley and his affirmative denials, that certainly puts a different light on this evidence.

MR. TREBON: Well, Your Honor, unless the Court has got a different transcript from the court reporter

than I did, we didn't ask him whether or not he had ever had sex with any other minors.

[1435] THE COURT: I understand that now, reading that.

MR. TREBON: I just want to quickly point out, maybe you don't want me to address this issue until next week, but under 608(b), specific instances of conduct, extrinsic proof of those is not required as impeachment matters.

THE COURT: We can discuss that further. I take a different view with respect to percipient witnesses and with respect to a defendant who testifies.

All right. Mr. Laughter ready to come in and testify?

MR. TREBON: Yes, Your Honor.

MR. HUSK: Your Honor, with regards to the two minor students that I identified to the Court, they are here today and I had anticipated putting them on. I don't know if the Court wants to take a recess prior to me doing that.

THE COURT: My inclination is not to allow them to testify, simply for a number of reasons, including all of the time that it's going to take and undoubtedly the same kind of back and forth business that we had earlier. And I think those witnesses were known to the Government earlier and could have been called earlier.

MR. HUSK: Fine.

THE COURT: So we will get the jury in and start them off an hour late.

MR. TREBON: Unless that child shows up, Your Honor, this is the only witness I have.

• • • •

[1626] All right. I was in the midst of reading a couple of cases that Mr. Husk provided. Did you give copies of those opinions or the citations to Mr. Trebon?

MR. HUSK: I did not directly, Your Honor.

THE COURT: If not, why don't you give them this, we will give you the copies, or make copies. Let me make a note of the cite and then we will give those copies to Mr. Trebon.

All right. Well then, we can discuss this and hear arguments, a little, in about 15 or 20 minutes perhaps, if that is convenient. I wanted to read those cases.

Also, it would seem to me that assuming the evidence is admitted, it would be admissible for two purposes, one to impeach Mr. Hadley with respect to his statements that he had not done these things with other people, minors.

And secondly insofar as the intent, motive, plan, et cetera, is concerned, so if the evidence is going to be admitted, then we can discuss whether the limiting instruction should be given again and whether anything should be said about the impeachment issue, or simply leave that for counsel to cover in argument.

Also, we have handed out the instructions and at some time after the evidence is over, when we have a recess, why we can also review those matters and discuss them and take up any issues related to that as well.

So, if it's—why don't we—the jury is coming in at [1627] 10:00, why don't we get together perhaps at 20 minutes of 10:00 and we can hear any arguments or have other discussions about this particular witness. Is that all right?

MR. HUSK: Fine. Thank you, Your Honor.

THE COURT: All right, thank you.

(Whereupon a recess was taken.)

THE COURT: Mr. Husk, all right.

MR. HUSK: May I proceed, Your Honor?

THE COURT: All right.

MR. HUSK: Your Honor, it is the Government's contention that the testimony of Kyle Hartman is admissible for two purposes.

One of those is under 404(b), and that is to show plan, motive and intent on the part of the defendant. And the other one is for the purposes of impeachment of the defendant's own testimony and that of various witnesses that the defense has presented.

If I may address the issue of 404(b) preliminarily, Your Honor. It is clear that the acts which Mr. Hartman testifies to, basically sodomy, are the same acts that are relevant, at least in the instances involving Amadee Roy.

As the Court has heard from various witnesses, including Dr. Bendheim, that type of sexual activity and that type of sexual preference is very unique and therefore we are talking about a very unique type of conduct and I think that [1628] is particularly important in this type of consideration.

We are however, Your Honor, dealing with an incident that occurred approximately 17 years ago. The furthest one being 17 years ago and occurring over a period of time for about five years, according to the testimony that the Court has received.

First of all, I think it is important to note that there are no absolute time requirements set forth in Rule 404(b), rather the Court's acknowledge that there is a reasonableness standard that each trial Court is to apply in determining the admissibility of those type of acts.

Setting that aside, there are cases, I would cite the Court to U.S. v. Cuch, C-u-c-h, 842 F.2d 1173, in which an act seven and a half years prior to a similar modem of operation was admitted.

Also, U.S. versus McCullom, a Ninth Circuit case, 732 F.2d 1419. And a case in which certiorari was denied in 469 U.S. 920, 105 Supreme Court 301. And in that case, a 12 year old conviction was admitted under 404(b) purposes, as well. Actually it was admitted under 609, but the court said that the act even though it exceeded 10 years under 609 was admissible under 404(b), regardless and therefore there was no error in that particular instance.

Finally, the Government would call the Court's attention to U.S. versus Engleman, and that is at 648 F.2d [1629] at page 479, in which prior crime 13 years prior to the charged offense was also admitted.

There is also, Your Honor, an abundance of case law that makes it very clear that in these type of instances if there is a gap in time, for instance, if a person is—if the act occurred 15 years prior, but the person has been in prison for 10 of those 15 years, that that basically tolls the time period.

And I think the Court has heard testimony in this particular instance that there was a period of time, as indicated by Mr. Hartman, where Mr. Hadley left and his own testimony indicated he went to the University of Arizona to work on his college degree.

He was out of the Kayenta mainstream, for all intents and purposes, outside the education field attending college. He was not at the institution—at any institution where he had immediate access to children. And I think that is another consideration that the Court should look upon favorably in admitting this type of evidence.

Finally, Your Honor, there is the concern of impeachment. As the Court is aware, matters can be admitted for impeachment. Impeachment is also one of the areas considered under 404(b). The defendant has testified that he never molested any minors. The defendant has had witnesses testify that he is not in the company of minors. Defendant [1630] himself testified that he has not allowed minors in his home, other than his nephews and friends and has never been alone with minors at his residence.

Those factors, Your Honor, clearly rebutted by the testimony of Mr. Hartman, and those factors should be brought forth to the jury. I think fairness indicates that.

The defendant has certainly raised the issue with the jury that I do not do this type of activity. And I am not—do not put myself in a position to permit this type of activity.

The testimony of Kyle Hartman goes directly to those issues and directly rebuts it and allows the jury to hear precisely the type of evidence that would directly rebut anything that the defendant has testified to at this point in the proceedings.

Finally, Your Honor, the entire defense, or a good portion of the defense in this case, has been on the issue of the FBI misconduct, interviews, suggestive interviews, intimidation tactics, some outrageous allegations on the part of the FBI.

This frenzy that Mr. Trebon talked about and this type of evidence where you have a person who has been completely removed from the community for a period of time and has come forward, outside of that community, certainy would go towards rebutting any allegations of misconduct on the part of the [1631] FBI, any suggestive interviewing techniques, any coercion, any intimidation.

And it is for those purposes, Your Honor, that the Government is requesting that the Court make the necessary finding regarding admissibility and permit the testimony of Kyle Hartman.

THE COURT: Thank you. Mr. Trebon?

MR. TREBON: As the Court is aware, we previously submitted a substantial memorandum regarding 404(b), and prior bad acts.

I would, without—and I have already argued those before the Court, they have been fully briefed before the Court. I think that going along with the Ninth Circuit and the statute and the law in the Ninth Circuit is correctly set forth in our memorandum. And I refer the Court to that substantial memorandum again.

taking the 608(b) issue first, specific instance of conduct, I believe under—I had a chance to read and have

with me a copy of Weinstein on evidence on the 608(b), specific instances of conduct are not provable by extrinsic evidence under 608(b). The probative of truthfulness or untruthfulness that may be inquired into on cross-examination.

Even then, Rule 403 analysis is required to determine whether or not they should even be allowed to be inquired upon cross-examination. Normally those involved acts of dishonesty [1632] or falsehood. In other words, the extrinsic act itself should involve dishonesty or false statement or something in and of itself that is probative of truthfulness or untruthfulness.

608(b) doesn't countenance asking the defendant various questions simply to see if he can elicit answers, so you can bring in collateral information to impeach him on those statements, when the impeachment evidence in and of itself is not probative of the truthfulness or untruthfulness.

Remoteness in time is a relevant consideration under 608(b). The time period under 609 is 10 years.

The often stated rule regarding 608(b) is that the examiner must take his answer, that the cross examiner is stuck with the answer he gets on cross-examination.

THE COURT: You think that is true with respect to the defendant?

MR. TREBON: Yes. And indeed that is what Graham on Evidence specifically states. I believe that—

THE COURT: Who on evidence?

MR. TREBON: Graham on Evidence. Handbook of Federal Evidence Second Edition by Graham at Section 608.4.

THE COURT: Read me what it says about the defendant.

MR. TREBON: It says "Extrinsic evidence with respect to the specific act or conduct of the witness is not admissible." 608(b). "The cross-examiner thus must take the answer given by the witness."

[1633] THE COURT: That doesn't talk about the defendant.

MR. TREBON: I am getting there. That is "any witness" includes the defendant.

"In spite of the text of 608(b)(1) that suggests that cross-examination of a witness, especially the criminal defendant, with respect to his prior acts and conduct not leading to a conviction is too inherently prejudicial, in light of probative value, and should rarely if ever be permitted."

And indeed Orfield, impeachment in support of witnesses in federal cases, criminal cases, 11 University of Kansas Law Review at 447, the specific pages are 460 to 464.

The general rules that federal courts—prior to enactment of 608 barred the use of prior acts to impeach at all. Under 608, again I believe that the cross-examiner is stuck with his answer. And, extrinsic evidence is not allowed merely for the purposes of impeaching a witness.

There are—there is another exception discussed in Weinstein, which is called, Evidence by Contradiction. Weinstein specifically states that that would only come about with respect to a defendant, if he, on direct examination had said I've never had sexual conduct with any other minor children. We know from examining the transcript in this case that that simply did not exist.

In fact, Weinstein goes on to say—

[1634] THE COURT: What's that now? You say in this case, I know that? Or is that what they are saying there?

MR. TREBON: In case. I'm saying in this case, we looked at the transcript and I did not ask him whether or not he ever had—

THE COURT: You didn't ask him, but the Government did.

MR. TREBON: That's right, on cross-examination.

THE COURT: Right.

MR. TREBON: And I objected to that whole line of questioning as being beyond the scope of direct. And the

rule is you can't ask a bunch of things of a defendant or any witness on cross-examination, so that you can plant a seed of bringing in other evidence. It was simply unfair in the first place and in fact, in the supplement to Weinstein on Evidence, at—

THE COURT: What page?

MR. TREBON: 608.27. If you want me to go through, there is two paragraphs that discuss this whole issue.

THE COURT: I will read it.

MR. TREBON: He talks about the fact, of course, if any evidence is allowed, it should be an essential element of the offense that it involves, it should be a material issue at trial, and moreover the defendant may have a valid objection under federal Rule 611(b) that the Government's cross-examination exceeds the scope of direct, which is [1635] exactly what one of the objections is that we raised.

And it becomes a 404(b) issue. I don't think that 608(b) is going to change the nature of the argument, that essentially is what it comes down to.

The Court has to make a 404(b) decision about this evidence, which comes back to the issues of intent and motive.

And of course, we have never raised those in the case. It is clear now, from our defense, that we have not raised the defense of intent as an issue in the case and I don't intend to argue that to the jury. I intend to argue that the later events did not take place.

And of course, that raises the issue of propensity. They will obviously tend to conclude that his prior acts tend to show that the propensity for these later acts occurring is strong. And that is why the evidence shouldn't be allowed because that is the use it is going to have.

In fact, there was—and it is discussed in Weinstein too, the Court probably has seen it, but there was a case in the Ninth Circuit that for a time decided that you could, use these other crimes evidence as impeachment and that was United States versus Batts, at 558 F. 2d

513, there was a strong dissent in that case that resulted in a Law Review article saying that the case had clearly been decided wrongly at 9 Rutgers Camden Law Review 375, a 1978 Law Review, Entitled, Federal Rules of Evidence 608(b). "We believe seized [1636] extrinsic evidence of prior bad acts of defendant is admissible for impeachment when exclusion"—

THE REPORTER: I'm sorry, John.

MR. TREBON: I'm sorry. The title is not important anyway, but there is a Law Review article on it. Later the Ninth Circuit abandoned that opinion and decided that the evidence was admissible for other purposes under Rule 404(b), namely knowledge in that particular case.

In fact, Weinstein goes on to say, at page 33, that, the restrictive purpose of 608(b) is exactly what it was intended to be. 608 was meant to limit specific instances of conduct, not to allow it. Otherwise the exceptions would swallow the rule and that was never the intent of Congress, nor the intent of the rule.

Here, as—the page that I previously told the Court about in the supplement to Weinstein, it is important to consider that there has been—that this as a prior bad act would be cumulative testimony under 404(b) and that the Court has already allowed other prior bad act evidence in this case. In fact, other prior bad act evidence of sodomy, even though that is barely involved in this case if at all.

You have to closely scrutinize the prejudicial effect. Of course, under 403, the prejudicial effect must be substantially outweighed by probative value.

And, presenting it in the—as surrebuttal, at this [1637] point, is prejudicial to the defendant as well. That is pointed out in Graham—in Weinstein's treatise as well, because a defendant getting the last say about such a major act is simply unfair. And, comes at the wrong point in the case.

The Government, we believe, does have a duty to argue these facts, bring it to the Court's attention, present it

in its case-in-chief, if it is legitimately relevant on the issue that is involved in the case.

Of course, in this case they did bring in the evidence. The Motion in Limine to present prior bad acts and we contested that and talked about it long before trial, as well as during the trial itself.

The Government has provided to the Court copies of two cases, I think both of those cases are instructive. These are the cases the Government relies upon, because the remoteness of time is obviously a factor.

I think it is fair to say without elaborating that remoteness in time goes against the Government, certainly not for it. These acts occurred a long time ago. They are less probative of the issues in this case, because of that remoteness in time, not better. But I agree that the cases generally hold that an act substantially that took place a substantial time ago may in peculiar circumstances be relevant. The question is whether or not that peculiarity [1638] exists here.

The first case—and these are copies that the Court provided to me, copies of cases the Court provided. U.S. versus Cuch, 842 F. 2d 1173, a 1988 Tenth Circuit case. This is a case in which there was an—apparently an attempted rape that occurred at the Goddess Stop Convenience Store in Utah, in an Indian reservation. Intent was the key issue in the case for trial.

The defense was that the defendant was trying to do an attempted robbery and was stopped in the act, but that he wasn't trying to rape her. The prosecution was allowed to present evidence of an act that occurred eight years earlier involving exactly the same style of offense by the defendant, which resulted in rape.

He used a rifle, he used some of the same language, he dragged the person outside of their residence into his truck and in the offense charged, he dragged the person outside of the convenience market into his truck.

The facts are very similar. And the defendant admitted on appeal that intent was the key issue. The

case says that the prior incident should be close in time, but talks over and over again about how intent was the key issue in the case.

At page 1177 "Here the defendant's prior sexual assault on Gardner is relevant and probative on the only issue at trial-intent."

[1639] "As acknowledged by the parties in the proceedings before the District Court and their oral argument on appeal, the entire thrust of the defense in this case was that the Government had failed to establish beyond a reasonable doubt the defendant's specific intent to sexually assault Borne."

They also noted that the defendant had been in prison for 30 months and that tolled the period of time involved. So actually the offense after the tolling was only six and a half years prior to the charged offense.

The second case that the Court provided me with, apparently provided by the Government, was Morgan versus Foretich, 846 F. 2d 941, another 1988 case, this time from the Fourth Circuit.

This was a case involving child sexual abuse in which one child was apparently abused by her father. They presented evidence—during child visitation. And the prosecution was ultimately allowed to present other abuse against her sister that occurred at the same time.

THE COURT: That isn't a criminal case, that is a civil case:

MR. TREBON: I'm sorry. The issue again was whether the evidence was highly relevant to disputed issues in the case, at 944. And they go on to say, "But prior acts are admitted to prove disputed issues in the case, such as the identity of the defendant," blah, blah, blah.

[1640] So in other words there, he was saying that he wasn't the person that did these. There were apparently physical injuries on the child and he said that they occurred in some accidental way.

That is exactly what we have taken out of the case. We have never said that these touchings occurred in an accidental way, we said that they didn't occur at all.

And that—945, they talk again about it being the central issues on trial that were disputed by the defendant.

Those simply are not—that simply is not the state of the evidence in this case. The arguments that Mr. Husk presented about, we are going to show that these weren't mistaken interviews by the FBI and overcome the defense, again there is no question about it, the evidence of this act supposedly committed on this person tend to overcome that defense, but that is on the basis of propensity, not the basis on 404(b) purposes, not to motive or intent.

It overcomes our case with propensity. Such the more that you present this evidence, the less credible our defense becomes, because it looks like he's been doing this for years. That's propensity argument and has a propensity effect.

Lastly, of course, not only is this evidence strong, I'm simply helpless to defend against it. I interviewed this person last night for the first time. They are acts that occurred 17 years ago, and several years thereafter, a year [1641] apart. The acts, as he described them could be off as much as a year he said. It will be impossible almost to investigate them now. But, I have had no chance to investigate them. I have no idea what this person's credibility is. I have no idea—we haven't been provided with any rap sheet on this particular person, whether or not he has a prior offense. He clearly told me he did not, but none of that information has been provided by the Government. I don't know if they have run it or not.

THE COURT: It wouldn't be a significantly part of time, but some significance, you were given the opportunity to interview this person last Friday as I recall.

MR. TREBON: Actually that is not true, Your Honor. When we left on Friday, because of other time pressures it was decided that I could interview him last night.

THE COURT: He was here on Friday, however.

MR. TREBON: Well, I didn't have a chance to interview him and didn't interview him until today.

THE COURT: I know you didn't interview him until today.

MR. TREBON: Last night, I'm sorry.

THE COURT: Last night.

MR. TREBON: I couldn't have conducted that kind of an investigation over the weekend anyway. It just would have been impossible to go up to Kayenta and possibly up to [1642] Colorado and to Phoenix or wherever we would have to go to investigate this person's credibility.

I would ask if the Court does allow it in, I would ask for a continuance of at least a month, or at least some significant period of time to investigate the facts.

But the major argument must be at this point, if we are going to have any chance of litigating fairly, the issues that took place with respect to the children involved in this case, at some point evidence of prior conduct has to stop.

There is three offenses that are being—three victims that are being tried together, three offenses against one of them. Five counts against the defendant, three different people, there has been substantial evidence of another relationship involving Cory Kay that has already been presented to the jury.

In fact as everyone said numerous times, litigation over whether or not those events took place and what they involved and so forth, including the defendant's statements and all that evidence, relate to Cory Kay, we spent much of the trial already litigating prior bad act evidence.

I am sure the Court could feel the impact of that evidence as well as I could. It's going to be extremely prejudicial. It is going to have a heck of an influence on the jury. I'm ot going to be able to do anything about testing any of its reliability. And it's going to essentially [1643] make it impossible for us to focus the issues on what occurred.

I stated repeatedly, I will say it again, that intent is not the issue in this case. I'm not going to argue intent

to the jury at the time of closing argument. I have been willing to stipulate on that matter ever since the case—ever since prior bad act evidence was discussed in this Court.

My defense may have a problem now, if this evidence is presented. But unfortunately it is after I have already presented my defense. I had to determine some kind of trial strategy before the case took place, obviously we did.

Whether or not this person was interviewed in a certain manner by the FBI is simply irrelevant to the issues on trial here. Verl Hadley could have 100 relationships with all kinds of people. And whether or not he had relationships with the people on trial is in issue, and it would be an issue in—the way that they are interviewed by the FBI would be a relevant issue in any event, but it is impossible to focus on that issue, if you present substantial evidence of prior misconduct that is going to be used by the jury for propensity.

There is many cases that recognize that these limiting instructions are not affected. I would ask a chance to—if the Court allows us to present expert testimony at a later time, that limiting instructions are not effective. I know [1644] that many psychologist and psychiatrists in the area feel that they are not followed by juries, there have been studies done with respect to that on juries, as I recall and I have not been able to do that research today, but nevertheless I believe that I could present credible evidence to the Court showing that those instructions are not followed.

This is extremely prejudicial. I can't deal with it in the time frame permitted. It shouldn't be allowed.

THE COURT: Well, again I think one of the substantial reasons that—why I'm going to admit this evidence is because the defendant took the stand and testified and, in carefully phrased questions on direct, with respect to time frames and other matters, denied that he had ever had sexual relations i.e. any intention in effect

to do those kind of things, any plan, any practice of doing those things, denied having minors in his home, denied any kind of activities similar to this.

I think also we have to—I have to consider the nature of a trial such as this and Ms. Linton can shake her head as I make any statements and that is fine with me as well, but the nature of these proceedings and the methods of proof that are available to the Government in these kind of instances is severely lacking. And it is more severely lacking when you go to an Indian Reservation and have young people, who are unsophisticated, unsophisticated with respect [1645] to the acts that are being visited upon them, arguably, but also unsophisticated with respect to the people who investigate these activities, and the questions that are asked and the phrasing of the questions and all those matters, which inevitably lead to impeachment, credibility issues.

And that has really been evident in this case as it was evident in the prior case that I tried recently, U.S. versus Todd.

There is a reluctance on the part of younger people to testify, a general unwillingness to do it, an unwillingness to come forward and be identified in these kind of activities. And as I say, the opportunities to confuse witnesses, to confuse issues, is simply overwhelming.

While the events involving this witness are remote in time, there certainly is a similarity in space and practice. These events are alleged to have occurred at Kayenta, at Baby Rocks and as we know their locations. They also involve the same kind of relationships as before, that we have had discussed here, that is, Mr. Hadley in his position as a teacher or a teacher's aid dealing with young students who are there.

The evidence is prejudicial. All evidence of any nature involving, or pointing directly to a defendant is always prejudicial. That is the purpose of the evidence that is presented, in a sense, to convict someone. Here I believe [1646] it is more highly probative than prejudicial.

Again, it is important evidence to the prosecution. It is evidence that is not, in a sense, otherwise available to them.

I will be mindful as we go through this process, to listen to the arguments of the Government, with respect to the relationship of this evidence, and that arguments regarding it should be confined to the instructions that have been given, or will be given again by the Court as to the purposes of this argument. And it is not to prove bad character or propensity.

In making those judgments, I have certainly looked particularly at the case reported at 842 Fed. 2d 1173, for these purposes.

And, we can discuss further when and immediately prior to the time the witness comes, whether to give the instruction again or what the limiting instruction is.

So that's my ruling. Now, you have a witness to call Mr. Trebon?

MR. TREBON: Yes, I do.

THE COURT: All right. That will be our first order of business.

MR. TREBON: Your Honor, I would like to add too that, I believe that there are many differences, perhaps some similarities, but many differences, between the matter involving Mr. Hartman and certainly the acts on trial.

[1647] If not even the acts of Cory Kay, but it is an act of sodomy and those aren't essentially, there is touching acts that are primarily the acts that are charged in this case, but I believe there is other differences as well.

Finally I would—the Court has made a ruling, so I don't want to argue that further.

I would ask the Court to give the limiting instruction simultaneously. I see that that instruction has been typed up, it is in the Court's proposed instructions here involving Mr. Kay and I would ask that the instruction be enlarged to include Mr. Hartman and at the time the evidence comes in as well as at the time that the Court gives its closing argument (sic).

THE COURT: I think probably we should make the instruction identity neutral really, the one that we have and I will look at that.

MR. TREBON: I would ask that the Court put in both names specifically.

THE COURT: All right.

The other thing that, while we are talking about this, and be thinking about it, and we are going to have to have a little time to discuss the instructions and also the counts and the law with respect to some of the counts. So I intend to pursue that with counsel. I think however we have to give consideration as to whether or not sexual contact is a lesser [1648] included crime with respect to the sexual acts that are identified regarding Mr. Roy.

MR. TREBON: It is an issue I haven't looked at, Your Honor.

THE COURT: I think we should, because as I say, I think that the--depending on the circumstances or how the jury perceives some of those matters, they could very well be, I believe, lesser included offenses of sexual contact.

MR. HUSK: Your Honor, with regards to what Mr. Trebon indicated on the limiting instruction, prior to the testimony. The Government has no objection to that. However, we would ask that that instruction be expanded to include the purposes of impeachment, which is clearly an issue in this case. And I don't think that the instruction by limiting it to just prior bad act, motive, intent, plan.

THE COURT: Well, I think you can argue the impeachment aspects of it yourself. You can say that Mr. Hadley testified as follows, on—when I asked him questions. And you heard this witness. And you can make your credibility assessments there.

MR. TREBON: Your Honor, a couple of other matters. First of all, I don't know if the record reveals it properly, so may I just say that I want the record to reflect our strongest objection to this evidence.

When it comes I will want to move for a mistrial, so I [1649] believe that this evidence is so strong, that if it is wrongly admitted, it does constitute prejudice so overwhelming, that a mistrial should be granted. I don't know if the Court wants me to raise that again after he testifies.

THE COURT: I don't know. If I admit the evidence, I don't know—you can certainly move for a mistrial. I have obviously considered admitting the evidence. And I can't believe that you would expect me to grant a mistrial after I have decided to admit evidence.

MR. TREBON: It is just in this age, Your Honor, I believe if I don't move for that, I may have some prejudice on appeal.

THE COURT: I don't know about that, but that is something can judge. You can certainly move.

MR. TREBON: Second of all, I did want to renew—I don't know if the Court wants me to do it now or wait until the witnesses—my short witnesses in and then Mr. Hartman, but I did want to renew my motions for judgment of acquittal that were made at the close of the Government's case, initially. Reminding the Court especially of the one count involving Amadee Roy where the only testimony has been is that he got the second count—

THE COURT: We will take that up after we get done at least and get the jury in now and start.

All right. Are you ready to go now then with respect [1650] to this next—what is the next witness's name?

MR. TREBON: Your Honor, I assume that the Court also denied my request for a continuance?

THE COURT: Yes: That request is denied.

Let's have the jury in.

(Whereupon the jury is returned to the jury box.)

THE COURT: All right, thank you, members of the jury. Mr. Trebon?

MR. TREBON: Your Honor, the defense would call as its last witness, Arnold Charley.

(Witness sworn.)

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[894] DIRECT EXAMINATION

BY MR. HUSK:

Q. Would you state your name and occupation for the record please?

A. My name is Cory Kay and—my name is Cory Kay and I'm not working now at the present time.

Q. Okay. How old are you, Cory?

A. 19.

Q. And when is your birthday?

A. November 2nd, 1969.

Q. And, Cory, where do you live?

A. In White Mesa.

Q. Is that on the Navajo Indian Reservation?

A. Yeah.

Q. And how long have you lived there?

A. All my life.

Q. Is that—is the White Mesa area near Kayenta?

A. Yeah.

Q. During the time that you lived at—on the reservation, have you known a person by the name of Verl [895] Hadley

A. No.

Q. Do you know Verl Hadley?

A. Yeah.

Q. And, when did you first meet him?

A. A few years back.

Q. Do you know about how old you would have been when you met him?

A. About 12 or 13 or 13 years old.

Q. And was he a teacher when you met him?

A. Yes.

Q. Do you know where he taught school?

A. Yeah, in Chilchinbeto Day School.

Q. Was he ever a teacher for you.

A. No.

Q. Did you go to Chilchinbeto ever?

A. Yeah, I did.

Q. But he wasn't a teacher when you were there?

A. Yeah, he was there.

MR. HUSK: Okay. Your Honor, I believe I am prepared to make the inquiries.

THE COURT: All right. Let me give you an instruction now, members of the jury, that you will be permitted to hear evidence of other similar sexual conduct to that charged in the indictment that allegedly occurred between Mr. Hadley and [896] Cory Kay.

You are permitted to consider evidence of other sexual conduct, which is not part of the charges of the indictment against Mr. Hadley here, only to the extent that they show motive, intent, preparation or planning.

Evidence that Mr. Hadley engaged in sexual relations with Mr. Kay, if so found, cannot be established as any evidence or proof whatsoever that he committed any of the acts charged in the indictment before you. That is to say, evidence that Mr. Hadley may have committed a similar act at an earlier time may not be considered by the jury in determining if Mr. Hadley is guilty of any of the offenses involved in this case.

In addition, you may not use evidence of the sexual acts between Mr. Hadley and Cory Kay to establish motive, intent, preparation or planning, unless you first find that the other evidence in the case, standing alone, establishes beyond a reasonable doubt that Mr. Hadley did the particular acts charged in the indictment before you.

If you should find beyond a reasonable doubt from other evidence in the case, not involving Mr. Kay, that Mr. Hadley did the acts charged in the indictment before you, then you may consider evidence of sexual acts between Mr. Hadley and Mr. Kay to establish motive, intent, preparation or planning.

Q. BY MR. HUSK: Cory, has Verl Hadley ever had sexual [897] intercourse with you?

A. Yes.

Q. And would that be anal intercourse?

A. Yeah.

Q. About how many times would you say this occurred?
A. Couple of times.
Q. More than 10? Yes?
A. Yes.
Q. More than 20?
A. Less.
Q. So between 10 and 20 times?
A. Yeah.
Q. When did this first start happening, how old were you?
A. When I just came back from placement.
Q. How old would you have been?
A. About 12.
Q. Okay. And where would this occur?
A. At this place.
Q. At his place in Baby Rock?
A. Yeah.

MR. HUSK: If I could ask the bailiff to show you some photographs, please.

THE CLERK: 6A, B and C.

Q. BY MR. HUSK: Showing you what's been marked as Government's Exhibit No. 6A, B and C, do you recognize those [898] photographs?

A. Yes.
Q. What do those photographs show?
A. It is his place and this is where it took place right here in this trailer.
Q. That would be Verl Hadley's trailer?
A. (Affirmative response.)
Q. And that's the way it looked at the time you that were over there?
A. Yeah.

MR. HUSK: Your Honor, I would move for the admission of Government's Exhibit No. 6A, B and C.

MR. TREBON: No objection.

THE COURT: All right. Those exhibits are admitted without objection.

MR. HUSK: I would ask that they be submitted to the jury at this time.

Q. BY MR. HUSK: Cory, how would you usually get to Mr. Hadley's house?

MR. TREBON: Objection, Your Honor. May we approach the bench?

DISCUSSION AT BENCH

MR. TREBON: Your Honor, I object to Mr. Husk continuously referring to these prior events in such a [899] generalized way. That no particular act is proven or referred to in any way, whatsoever, makes it impossible for me to cross-examine on any particular act to get out the details of it to see if he is telling any kind of consistent story.

I think he's got to talk about specific acts, not just what did you do over the last lifetime.

THE COURT: Well, why don't you try to establish as best you can when the first act occurred and when they would—they would occur subsequently, et cetera, et cetera.

MR. TREBON: I would ask that they be related to the acts alleged in the indictment, on September 5th.

THE COURT: No. I'm not going to let him get into that.

MR. TREBON: Isn't that enough?

MR. HUSK: He's already testified between 10 and 20 times. I don't think that evidence is before the jury at this point.

THE COURT: Let's try to find out at least when the first times were and then get into some—try to establish the dates, when they occurred, so Mr. Trebon, to the extent he can, has that information available to him and what the pre-events were, so forth.

MR. HUSK: My intention, Your Honor, was to generally discuss what happened and get into the specifics, this is just in the way of foundation.

[900] THE COURT: The problem is, if you don't get back to the specifics, we have Mr. Trebon's concerns.

MR. HUSK: I do intend to do that.

(End discussion at bench.)

Q. BY MR. HUSK: Cory, do you remember something happening between you and Mr. Hadley on September 5th of 1985?

A. Yes.

Q. Can you tell us what happened that time? How did you get to Verl's house?

A. He picked me up.

Q. Excuse me?

A. He picked me up.

Q. Where did he pick you up?

A. Thriftway, Thriftway, from Thriftway.

Q. Why don't you hold that for you—talk directly into it. You say from Thriftway or Sam's place; is that right?

A. Yes.

Q. And, what time did he pick you up?

A. About 10:00.

Q. About 10:00 o'clock. Is that 10:00 o'clock in the morning or 10:00 o'clock at night?

A. Evening.

Q. What did he do when he picked you up, where did you go?

A. We went to his place first and then we came back into town.

[901] Q. Did you go back to his place again later?

A. Yeah.

Q. And who was with you when you went back the second time, was that just you and Verl or was someone else with you?

A. Just only us.

Q. What happened when you went to Verl's house the second time, can you tell us? Can you tell us what happened, Cory?

A. Yeah.

Q. Okay.

A. Well, we watched a movie in there for a while on the couch.

Q. You watched a movie there for a while on the couch?

A. Yeah.

Q. And, was that a TV movie or a video movie?

A. It was a video.

Q. And, what happened while you were watching the movie?

A. He told me to take off my clothes.

Q. And did you take off your clothes?

A. Yeah.

Q. Now, when this happened, Cory, were you smaller than you are now or were you the same size?

A. I was smaller.

Q. Were you smaller than Mr. Hadley?

A. Yes.

Q. Did Mr. Hadley ever go get anything?

[902] A. Beer.

Q. Did he ever go get lotion?

A. Yeah.

Q. What kind of lotion?

A. Ola, something like that.

Q. Ola?

A. Yeah.

Q. Could it have been Aloe?

A. Yeah, something like that.

Q. Can you describe what it was in?

A. It was a plastic container.

Q. What size?

A. About.

Q. Just show us with your hands about how?

A. Foot.

Q. A foot?

A. Yeah.

Q. What did he do with the lotion?

A. He put it on me and some on himself.

Q. After he put lotion on you, did he have anal intercourse with you?

A. Yes.

Q. When he first had anal intercourse with you, do you remember the position you were in?

A. I think I was on my back. I was on my back.

[903] Q. Did he also have intercourse with you while you were on your stomach?

A. Yes.

Q. Did he also have intercourse with you while you were on your hands and knees?

A. Yes.

Q. And did he have intercourse with you while you were on his lap?

A. Yes.

Q. Seated on his lap?

A. Yes.

Q. And each of those times, did he take out his penis and then put it in again?

A. Yes.

MR. TREBON: Objection, Your Honor, to these leading questions.

THE COURT: Sustained.

Q. BY MR. HUSK: How long did this occur, all these different times?

THE COURT: Now, are you talking about the September the 5th?

MR. HUSK: I will clarify, Your Honor.

Q. BY MR. HUSK: The incidents that you just described, did those all happen on September 5th, that same night?

A. Yes.

[904] Q. And, over what length of time, how long was it that you were there?

A. Five minutes, something like that.

Q. Okay, when it started. When did you leave his house?

A. In the morning.

Q. About what time?

A. About 7:00, dropped him off—he dropped me off over at my place.

Q. He dropped you off over at your place?

A. Yes.

Q. Did something—did another incident occur when you were hitch hiking?

A. Yes.

Q. Why don't you tell us what happened that time? Where were you hitch hiking from?

A. Blanding, Utah.

Q. Blanding, Utah?

A. Yes.

Q. And were you hitch hiking by yourself?

A. Yes.

MR. TREBON: Objection, Your Honor. May we approach the bench?

DISCUSSION AT BENCH

MR. TREBON: Your Honor, correct me if I am wrong, but [905] I believe the record will show that on Friday he testified that the incident that he just talked about was the incident that occurred after he hitch hiked from Blanding, Utah, so Mr. Husk is going to use the hitch hiking reference as another way to talk about the same story and the jury will think it is another incident. Friday he described, that is the incident of September 5th.

MR. HUSK: Your Honor, those incidents are set forth in the Government's Motion in Limine in separate incidents.

THE COURT: Well, you can ask him now whether this was a separate incident from September 5th.

I confess I don't have any specific recollection. I know we got into this event, but whether this was September 5th or some other I can't remember at the minute.

MR. HUSK: I don't think it was really clear as a result of the hearing, I think it—

THE COURT: Why don't you try to establish, if you can, the time. You have got an event, now let's try to pick out when the time was, so at least Mr. Trebon will know that.

MR. HUSK: That's fine.

MR. TREBON: Oh, Your Honor, while we are up here maybe this is getting ahead of the game a little bit, but when I cross-examined him on Friday he admitted that when he made this—reported it to the Navajo Division of Public Safety he made it after they came to see him about raping a 14 year old, [906] if you recall, which he admitted that he did do on Friday. Am I permitted to ask him that, because that is prior sexual activity, I suppose, but the point is it shows a motive for falsifying a report, a motive to get the heat off of himself and on someone else, I think that is relevant.

THE COURT: We will take that up after the recess. We don't have to resolve that right now.

MR. TREBON: Okay.

(End discussion at bench.)

Q. BY MR. HUSK: Cory, do you remember when it was that you were hitch hiking? Do you remember what year or what month?

A. It was in the summer.

Q. Summer months?

A. Uh-huh.

Q. Was it before or after September 5th of 1985?

A. I can't remember.

Q. Okay. Did anything happen that night?

A. Yes.

Q. Tell us what happened. You said you were hitch hiking from Blanding?

A. I—

Q. You made it how far?

A. As far as Dennehotso.

Q. Dennehotso.

[907] THE COURT: Let me see counsel.

DISCUSSION AT BENCH

THE COURT: Well, it seems to me consistent with what I said before that we don't get into a bunch of sexual experiences with respect to propensity, that—subject to Mr. Trebon's position, you could ask a question having to do with the other activities, including his going to Mr. Hadley's house, some prior activities at the house, getting out the lotion bottle and then let it go at that, and then—because otherwise we are simply going to have a string of anal intercourse, end to end, without really dwelling on what are the specifics that I think are important. And that is that whatever they were, they were done about the same time.

We have a broad number now and it seems to me then that Mr. Trebon, to the extent that he would want to, could go into the details of them, but at least for the Government's presentation, I would think, if you said that—if you ask him a question, leading him in that respect, that the other activities were followed, a similar course, that they met and/or he went there, that—we haven't had any pinching. That might be something that you could inquire about as well, but then those kind of things occurred on the other occasions and Mr. Trebon can pursue them if he wants to. That seems, at least a better practice.

[908] MR. TREBON: Yes. To limit it to September 5th.

THE COURT: The September 5th and other general.

MR. HUSK: Oh, other general.

THE COURT: General activities, or similar, insofar as the meeting, where they would meet, and that they would then wind up at the house and out would come the bottle of lotion, you know, that sort of thing, rather than to get each time the bottle of lotion came outside, he was in 17 different positions.

MR. TREBON: I would object to leading questions on pinching. I don't think if he is led on that—he's never

said anything about a month. If he's asked, he will throw in any month. I object to Mr. Husk asking a leading question on pinching.

MR. HUSK: I'm going to have some leading questions. I don't intend to ask a pinching question, but I'm obviously going to have to ask some leading questions to get out of here as quickly as possible.

THE COURT: I think in a sense, summary, whatever just so we don't get all the details Mr. Trebon objects to.

MR. TREBON: I don't object to leading questions for guidance purposes.

THE COURT: All right.

(End discussion at bench.)

Q. BY MR. HUSK: Cory, how would you usually get to Mr. [909] Hadley's house?

A. I would get picked up.

Q. You would usually get picked up?

A. Yes.

Q. Where would you usually get picked up at?

A. In Kayenta.

Q. In Kayenta. And, was Mr. Hadley the person that picked you up?

A. Yes.

Q. And, was it Mr. Hadley—how—what was Mr. Hadley driving?

A. Maroon car.

Q. Maroon car. And when you went over to Mr. Hadley's house, did you usually go over there by yourself or were there other people there?

A. Sometimes.

Q. Sometimes there were other people there?

A. Yeah, just for a while though.

Q. Now, when you had anal intercourse with Mr. Hadley, were there other people there at that time?

A. No.

Q. None of the times was there anyone else there?

A. Nobody.

Q. And, when you had anal intercourse with him, did he always use the lotion?

[910] A. Yes.

Q. Cory, do you know the difference between a truth and a lie?

A. Yes.

Q. Do you understand that Friday you swore that you would tell the truth here in Court?

A. Yes.

Q. And are you telling the truth about what Verl did to you?

A. Yes.

Q. You are not lying about that?

A. No.

MR. HUSK: I have no further questions at this time.

THE COURT: Well, let me see counsel again.

DISCUSSION AT BENCH

THE COURT: At some time, I take it, Mr. Trebon is going to ask him who—he was a suspect in a rape case?

MR. TREBON: Yes, Your Honor. His answers with respect to that are clear from Friday. I believe he admitted that he was, and that he admitted that he had raped someone.

THE COURT: Was this in '83 or '85, do you know when the charge was?

MR. TREBON: It would have been in '85. That is when he first reported the crime to the Navajo Division of Public [911] Safety.

MR. HUSK: For clarification, that was not revealed until he went in for a physical examination. It was not revealed at the time they took the initial report.

In other words, the Navajo police were not present to interview him for that purpose. They were present regarding his complaint. He went to the clinic and at that

point in time the doctor at the clinic asked him if he had been involved in that, he indicated, yes. So, as far as the previous representation by Mr. Trebon, I think it is inaccurate. He did not report that to the Navajo police, that is not why the police were there.

MR. TREBON: He didn't report to the Navajo police, but that is one reason why they were questioning him.

MR. HUSK: No.

THE COURT: It is my understanding from what Mr. Husk says now, is that the reason the police went to him, was because of his complaints against Hadley and these other people?

MR. HUSK: Right.

THE COURT: And then after that, they found out about the—how did it come up?

MR. HUSK: Afterwards, he goes to see a doctor at the clinic. The doctor remembered hearing his name and she mentioned, "Weren't you involved with this other girl?" And [912] he indicated to her, yes, I believe is the report.

THE COURT: Well, let's stay away from that, at least until after—you will be with him for sometime, until the recess?

MR. TREBON: When is the recess?

THE COURT: Well, I don't know.

MR. TREBON: I will be with him for a little while, I could ask—I'm not clear, and I don't want to violate the Court's order, do I get to ask him, at the same time there was a complaint against Morris Singer and Yazzie, without asking if he had sex with them. I can ask if they were charged? I can't ask him that?

THE COURT: No, not now.

MR. TREBON: I wouldn't ask him if he had prior sex with them.

MR. HUSK: Same thing.

THE COURT: If you ask him, Mr. Husk can ask him about matters such as that, I suppose, but again I think those go to his credibility and whether they are precluded from 412.

You haven't made—to the extent it is 412, you haven't made any kind of a proper showing, or a timely showing, to the extent of its credibility or arguably credibility, I think it violates Rule 412 and it simply will lead us to other problems and procedures, so the fact that he made the complaint, I don't think is going to be admissible [913] now at this time for those purposes.

MR. TREBON: Well, Your Honor, the ruling that this witness was going to be allowed to testify about prior acts was not actually made until yesterday.

I don't know when I was supposed to make a timely showing with respect to these prior bad acts.

THE COURT: Insofar as 412 is concerned you were supposed to make them some time ago in a certain fashion, with respect to credibility, I rule on that now.

And I'm saying that it is not—it is part of 412 and to admit it would violate 412, also under 403, would lead us to other activities and delay and confuse the jury.

MR. TREBON: So I can only ask him about the fact that he previously made the allegation against Mr. Hadley, not include Morris Singer or Sampson Yazzie at all?

THE COURT: Well, if we get into Mr. Hadley, we have got the same problem. He made them and withdrew them.

MR. TREBON: I certainly can ask him that.

THE COURT: How can you ask him that?

MR. TREBON: I'm going to ask isn't it true that he made these allegations against Mr. Hadley back in 1985 and talked to Sergeant Laughter?

THE COURT: And asuming, yes, he did. Then what?

MR. TREBON: I'm going to ask him what he told them, an inconsistent story about what he is saying now.

[914] THE COURT: I will sustain the objection to that as well, for the same reasons that I have stated.

MR. TREBON: Your Honor, I'm not—my whole right to confront this witness is gone if I can't ask him what

he's previously said about the same case, those prior inconsistentent statements.

(End discussion at bench.)

THE COURT: Members of the jury, let me ask you to step in the jury room for just a few minutes and we will get you right back in.

(Whereupon the jury is excused from the courtroom.)

THE COURT: All right, Mr. Trebon?

MR. TREBON: Your Honor, I understand 412 limits prior sexual activity.

THE COURT: I can't hear you.

MR. TREBON: I know that Rule 412 limits prior sexual activity. I want to ask the witness about the previous time that he reported this incident, what he told them about it then and so forth.

Those are simply prior inconsistent statements from his testimony today. I don't think the 412 in any way limits my ability to do that, the fact that he made a charge and the fact that he later refused to prosecute.

THE COURT: The fact that he later refused to prosecute [915] doesn't have anything to do with whether he made the prior inconsistent statements. Now if you have prior inconsistent statements, that is something else.

MR. TREBON: I think he's already testified on Friday that the reason that he didn't go forward was because he couldn't get a ride, that is all I would ask him now.

THE COURT: That isn't a prior inconsistent statement, insofar as these proceedings is concerned.

MR. TREBON: It is relevant to why someone would make a charge and then not proceed further.

THE COURT: Well—

MR. TREBON: I'm not talking about a prior unrelated charge, I'm talking about the charge related to the same incident.

THE COURT: If you have prior inconsistent statements, that he didn't do it, or this or that or whatever,

then you can go into those matters. But we are not going to get into whether or not he had a ride or anything like that. That is just confusing and misleading to the jury and it is going to take up time and it is impeachment on an immaterial or collateral proposition, as far as I am concerned.

MR. TREBON: Your Honor, you don't think that the credibility of this witness can be judged on what he did with the same incident previous, that he made—

THE COURT: Not as to whether or not he withdrew the [916] charge because he didn't have a ride.

MR. TREBON: I know I can show evidence that he did, so that—

THE COURT: That he had a ride?

MR. TREBON: Yes.

THE COURT: Then, so what? That is my reaction to that. Doesn't impeach him in any way insofar as something material for the jury's consideration is concerned.

MR. TREBON: I belies the credibility of the witness, Your Honor. We are talking about the same incident that he's accused Mr. Hadley of today that he has accused him of earlier, his conduct.

THE COURT: He said that he did it because he didn't have a ride over and you want to prove that he had a ride over.

MR. TREBON: Exactly.

THE COURT: All right. Well, I am saying that is impeachment on an immaterial and collateral point and wouldn't in any way be determinative of any issue here, or we just get into then whether or not he had a ride or didn't have a ride, et cetera.

If you have prior inconsistent statements about what he said here before the jury, then I will permit you to do that.

MR. TREBON: Your Honor, I agree that this no longer becomes just a question of impeachment. Now I think the Court [917] has simply precluded me the chance to confront and cross-examine the witness at all.

THE COURT: You are not precluded from cross-examining him about anything he said in this courtroom before this jury. And to prove any of his statements are inconsistent.

My understanding was when we were over by the side bar that the officer said—you were going to present evidence that the officers were going to say that his recounting of the event of the incident were different than what he's testified before the jury.

MR. TREBON: That is part of what I want to do.

THE COURT: You can do that, but not whether or not he had a ride over.

MR. TREBON: Well, whether or not he refused to testify.

THE COURT: He never refused to testify, because he was never subpoenaed and not called.

MR. TREBON: I have testimony that will show that he did refuse to testify.

THE COURT: Was he subpoenaed and didn't show up?

MR. TREBON: He signed a declaration for officer Wiseman and said that he would not willingly testify in the case. That is very, we feel—

THE COURT: Why can't they show that, Mr. Husk?

MR. HUSK: I'm not sure I understand the issue. The [918] Court is asking why they can't introduce evidence that—

THE COURT: That he refused to testify.

Then we come back to why did he refuse to testify and we are off on that.

MR. HUSK: I think so. And I think the Cardinal case addresses that very issue, the case provided to the Court, that the Court's discretion regarding, you know, how much it can get into that type of stuff is the final issue in that matter and I think Cardinal restricted that.

MR. TREBON: Your Honor, the Cardinal case dealt with a prior charge that was withdrawn that was unrelated to the case under question.

THE COURT: Well, it seems to me then, if you get into that aspect of it as well, it is simply going to mislead and confuse the jury and the Government will then have the right to say that there is now a charge pending in federal court in this case involving Mr. Kay and Mr. Hadley out of that incident.

The fact that someone withdraws a charge, doesn't seem to me, is—goes to any issue in this case and it simply is impeachment on some other point and we are going to get confused and mislead the jury and take up time as to the relevance or the importance of that. That is impeachment on some point that you are bringing up and it just isn't going to serve any purpose here, Mr. Trebon.

[919] MR. TREBON: Shows the intent and motive of this witness.

THE COURT: Why is there any intent or motive, if he withdraws a charge, to testify falsely here? Not at all. And particularly when there is a—it misleads the jury because there is presently pending a charge in which Mr. Kay is the victim.

MR. TREBON: Well, we know he has reinstituted the charge and that is what he is saying today.

THE COURT: Pardon?

MR. TREBON: We know he has reinstituted the charge and that's what he's testified to today.

THE COURT: If you bring that out, then the Government can bring out the fact, it seems to me, that the charge is reinstituted and is pending.

MR. TREBON: I'd hardly get evidence from this witness as to that. I'm trying to bring out evidence of what this witness knows, what he did in relation to the charge, not what the United States Government did in relation to it.

THE COURT: The Government can bring out, seems to me, that there is then a charge pending. Whether or not he prosecutes or not—and if he withdraws the

charge, it seems to me that that simply is going to mislead, confuse the jury, take up time and get in arguably the fact that there is presently pending a charge. Why we do it, all those kind of [920] matters, are then things we have to get into.

MR. TREBON: His credibility is in issue, the fact that he withdrew the charge certainly relates to it. I ask the opportunity to cross-examine on that area.

THE COURT: Well, I will deny it at this time for the reasons that I have stated.

MR. TREBON: May I make just a verbal offer of proof, now or—

THE COURT: Well, you say you have a document, let's—why don't we use the document?

MR. TREBON: Your Honor, I have a—certainly. Would you like a—I could introduce, for partial proof, offer of proof, the Navajo Division of Public Safety reports that relate to this.

THE COURT: You said you had a report, Mr. Trebon, that he signed asking to withdraw the charge.

MR. TREBON: Your Honor, I didn't say I had such a document. I didn't say I had it.

THE COURT: Where is it?

MR. TREBON: I subpoenaed the document. The Navajo Division of Public Safety has lost the document. So now I only have the verbal testimony of Officer Wiseman relating to the document, although his report says it is attached. The problem is, it is no longer attached.

What the report does say—

[921] THE COURT: Well, I will sustain the objection at this time. We will take that back up after the next recess, if you want to.

But again I want to make sure, Mr. Trebon, and I'm not being critical of you, but when you tell me something, I want you to tell me all the details. And if you didn't have the report, I certainly had the clear impression that you had a document signed by the witness.

Now, if you had given me the explanation the first time, that would have been much better insofar as my being able to judge some of these things are concerned, because whatever I was going to do was based upon your representation that there was such a document. Now we get into whether there was or wasn't or where is it and what it said, et cetera.

MR. TREBON: Here is what the report says. I'm sorry, I didn't mean to represent that I had the document, but that he did sign it.

When Mr. Kay was asked if he still wished to press charges—

THE COURT: Read slowly now, speak into the microphone.

MR. TREBON: This is Ruben Wiseman report, dated February 20th of 1986, relating to the incident that supposedly occurred September 5 of 1985.

The Navajo Division of Public Safety, Case No. 06-85-05686. This is page 7 of 7.

[922] "When Mr. Kay was asked if he still wished to press charges, he stated that he did not want to. He wanted to drop the charges he had made against Verl Hadley, Sampson Yazzie and Morris Singer.

"On January 31, 1986 at approximately 9:44 hours, Mr. Kay signed a declaration, which was explained to him. His declaration states, he, Cory Kay would not testify willingly if the case was brought to court."

Then it goes on to summarize other evidence.

THE COURT: Well, we will—make me a—Mr. Myer will make a copy of that for me and I will look at it during the recess.

Let's go into some other areas, if you have any. If not we will take a longer recess while we do that.

MR. TREBON: No, Your Honor. I can consume some time with other areas.

THE COURT: All right. Let's get have the jury in.

MR. TREBON: If I go slow, it is because I am trying to refer to my notes and keeping within the Court's rulings.

THE COURT: That's all right.

(Whereupon the jury is returned to the jury box.)

(Whereupon the witness resumes the witness stand and testifies further as follows:

[923] CROSS EXAMINATION

BY MR. TREBON:

Q. Morning, Mr. Kay, how are you?

A. Pretty good.

Q. My name is John Trebon and I represent Mr. Hadley in this matter and I'm going to ask you some questions.

You're 19 years of age; is that right?

A. Right.

Q. And, I believe on Friday, when you testified out of the presence of the jury, didn't you say that you had never been to the Chilchinbeto Day School?

A. What?

Q. Pardon? I think today you said that you were a student at the Chilchinbeto Day School; is that right

A. Yeah, I was there when—preschool, I think it was.

Q. What year was that?

A. I'm not sure.

Q. Did you ever see Mr. Hadley there?

A. Yes.

Q. On Friday, didn't you testify that you had never been a student at the Chilchinbeto Day School?

A. That was a mistake.

Q. How long were you a student there?

A. Just for a year, and then I went on placement.

Q. And what year was that that you were a student?

[924] A. 1980.

Q. And how old were you at that time?

A. About, about 11.

Q. You said that—today, I believe that Mr. Hadley picked you up in a maroon car; is that right?

A. That's right.

Q. And this is something we talked about on Friday as well. Didn't you tell us then that you saw the same car outside of the courtroom?

A. Yeah.

Q. The car that Mr. Hadley had picked you up in was the same car that he was driving now; is that right?

A. Yeah.

Q. And that you had seen the car parked outside the courthouse on Friday; is that right?

A. That's right.

Q. And that that car used to be maroon in color; is that right?

A. Yeah.

Q. And it is a different color now; is that right?

A. Yes.

Q. That you knew Mr. Hadley had painted the car?

A. No.

Q. Isn't that what you said on Friday?

A. No.

[925] Q. But you are sure that the car that he picked you up in is the same car that he is driving now?

A. Yes.

Q. Now, you previously talked to a Sergeant Laughter and a Ruben Wiseman about this incident of September 5th, did you not?

A. Only Raymond Laughter.

Q. Pardon?

A. Only Raymond Laughter.

Q. And that was in 1985; is that right?

A. Yeah.

Q. Today you reported that Mr. Hadley picked you up on September 5th to take you out to his trailer; is that right?

A. That's right.

Q. How many people were there?
A. There were—
Q. It was just you and Mr. Hadley?
A. Yes.
Q. The entire evening?
A. Yes.
Q. Where did you meet Mr. Hadley?
A. At the Thriftway, I think it was.
Q. Do you remember previously telling Sergeant Laughter that Mr. Kay had told—or Mr. Hadley had told you to wait at the 7 to 11 Store for him, but that he never came?
[926] A. No.
Q. And then you hitch hiked out to Mr. Hadley's residence to see him? Did you tell Sergeant Laughter that?
A. I can't remember.
Q. Did you ever tell Sergeant Laughter that you partied with a bunch of people out there, not just Mr. Hadley, but a bunch of other people as well?
A. His friends.
Q. Were they out there on September 5th?
A. I can't remember.
Q. Well, you just told us that you were alone. Were you alone or were you with other people out there?
A. We were alone.
Q. The entire evening. You need to answer out loud, I'm sorry?
A. Yes.
Q. When you first met with Mr. Hadley on September 5th, was Sampson Yazzie and Morris Singer and Arnold Dohi also present?
A. I think so.
Q. And you know all those individuals?
A. Yes.
Q. Did all of those individuals go out to Mr. Hadley's house with you?
A. Yes.

[927] Q. And this is the September 5th incident?
A. Yes.
Q. And is that a party in which you drank a lot of alcohol?
A. Yes.
Q. Did you have several mixed drinks?
A. Yes.
Q. And then during that party, did you—let me ask you this, before you drank on September 5th, you had drank before, had you not?
A. Nope.
Q. You had never been drinking before whatsoever?
THE COURT: Now, let's be specific. That night or some other time.
Q. BY MR. TREBON: Before September 5th?
A. No. I was not drinking.
Q. Pardon?
A. I wasn't drinking.
Q. You weren't drinking on that evening?
A. No.
Q. September 5th of what year did this happen do you know?
A. I can't remember.
Q. How do you know it was September 5th?
A. I was there.
Q. How do you know the date?
[928] A. Well, it was between some time in that day.
Q. But now you are telling us you can't tell what year it was; is that right?
A. No.
Q. Prior to the time that you went out to Mr. Hadley's trailer on this supposed incident, did you drink alcoholic beverages before?
A. No, not until after I got there.
Q. Well, other than that night just—
A. No.

Q. Let me ask the question, because I think we may have miscommunicated.

As a general proposition do you drink alcohol?

A. Yes.

Q. And, do you get drunk?

A. No.

Q. You never get drunk?

A. No.

Q. Before September 5th of 1985, did you drink alcohol?

A. Yes.

A. If it was offered.

Q. And would you get drunk?

A. Yes.

Q. Now, on September 5th, now that is the time that you are talking about, did you or did you not drink?

[929] A. Yes, I drank.

Q. You did drink? Did you get drunk?

A. Yes.

Q. How much did you have to drink?

A. Several—several cans and shot glasses.

Q. All right. Shot glasses of what?

A. Of Gin, Bacardi, that's all I can remember.

Q. And isn't it true that after you drank on that evening that you passed out?

A. Yes.

Q. And that when you woke up your clothes were off; is that right?

A. Yes.

Q. And isn't it also true that you merely assumed that Verl Hadley had sex with you, since he was the only one there when you woke up?

A. Yes.

Q. And that you assume someone had sexual relations with you, because you had hickey's is on your neck and other physical signs of sex; is that right?

A. No.

Q. Why did you assume that someone had sex with you?

A. Because—because he was right beside me at that time.

Q. But it is true isn't it, sir—

A. Yes.

[930] Q. —that you do not remember Mr. Hadley having sex with you at all on September 5th; isn't that true?

A. No.

Q. You do remember or you don't?

A. I do a little bit.

Q. Well, isn't it true that you passed out and you didn't wake up until the next morning.

MR. HUSK: Objection, Your Honor, that question has been asked and answered.

THE COURT: That's true.

Q. BY MR. TREBON: Isn't it true that you weren't awake when anyone, if anyone did, when anyone had sexual relations with you that night?

A. I was up for a while.

Q. Isn't it true that you were not awake when anyone, if anyone, had sexual relations with you that night?

A. No. He is the one that did that.

Q. Pardon?

A. No. He is the one that did that.

Q. My question is, isn't it true that you weren't awake, you were not awake when this occurred, when sexual acts supposedly took place?

A. Yes.

Q. Now, when you talked to the Navajo Division of Public Safety, you never told them about any previous incident when [931] you hitch-hiked from Blanding, Utah, did you?

A. No.

Q. Isn't it true that when you were interviewed by the FBI they told you that if a criminal case was successful against Mr. Hadley, that you could sue him for money?

A. No.

Q. Didn't the FBI tell you at that time too that Verl Hadley did this with other people too?

A. Yes.

Q. You talked to the FBI numerous times, haven't you?

A. What?

Q. You have talked to the FBI numerous times, haven't you?

A. Yes.

Q. But they didn't tell you you could sue anyone then; is that right?

A. No.

MR. HUSK: Objection, that's been asked and answered.

THE COURT: True.

MR. TREBON: Your Honor, may I have an exhibit marked to show it to the witness.

THE COURT: Certainly.

THE CLERK: Exhibit D marked for identification, D.

MR. TREBON: Here is a copy for the Court.

Q. BY MR. TREBON: Mr. Kay, do you remember a time that I interviewed you on October 6 of 1988 at your home in White [932] Mesa?

A. Yes.

Q. And, was someone else present with me at that time?

A. Yes.

Q. And do you see her in the courtroom today?

A. Yes, your partner.

Q. Ms. Linton, stand up. Is that the woman that was with me?

A. Yes.

Q. And, I asked to take a tape recorded statement from you at that time, did I not?

A. Yes. And I said no.

Q. And you refused to allow me to use a tape recorder; isn't that true?

A. Yes.

Q. But instead we tried to write down what you had to say and then you read over—or I read the statement over for you and you signed it; is that right?

A. Yes. I didn't want to, though.

Q. Did you sign the statement?

A. Yes.

Q. Was the statement true and correct?

A. Yes.

Q. It is what you told us; isn't it?

A. Yes.

[933] Q. And do you see the statement before you that's been marked for identification purposes as Defendant's Exhibit D?

A. What?

Q. Do you have a document before you, a piece of paper before you?

A. What about that?

Q. Is that the statement that you signed on October 6 of 1988?

A. This one?

Q. Yes.

A. Yes, I put my initials on there, just only my initials CK.

Q. And CK stands for Cory Kay?

A. That's right.

Q. Is there three pages to that document that is ahead of you?

A. Yes.

Q. Has paragraphs numbers one through sixteen?

A. Yes.

Q. And it has your initials at the end of it; is that right?

A. Yes.

Q. And also didn't you put a K on the first and second page as well?

A. Yes.

[934] Q. Does that look like the true copy of what you signed back on October 6 of 1988?

A. Yes.

MR. TREBON: Your Honor, I would move for the admission of Exhibit D.

MR. HUSK: Your Honor, may I voir dire the witness on the statement.

THE COURT: Well, why don't we do this, let's take a recess. We have had the jury up and down, in or out.

Members of the jury, we will take a 20-minute recess and then we will probably go until 12:30, unless some of you have some particular problem, that will get you all in a restaurant more conveniently as well. So we will go that way and try to make up some of the time.

So we will take a recess now until 11:20.

(Whereupon the jury is excused from the courtroom.)

THE COURT: All right. Let's take a—we will come back at a quarter after and then we can discuss any matters and give the court reporter a minute to relax. All right?

(Whereupon a recess was taken.)

THE COURT: First off, Mr. Husk wanted to have some voir dire about the statement and I suppose that really is going to be more cross-examination than voir dire, circumstances, matters such as that.

[935] MR. HUSK: Yes. I can certainly hold off on that. I guess my general objection to the admission of the statement is that it is hearsay and it does not fall under any of the hearsay exceptions.

THE COURT: How about that?

MR. TREBON: Well, Your Honor, he just admitted he made the statement and that the statement was true. It is no longer hearsay.

THE COURT: Well, he can say the same thing here. Sometimes that's what I wonder about.

MR. TREBON: He did say here that he had made the statement on October 6 and it was true and correct.

MR. HUSK: Your Honor, my problem is—and perhaps this was the foundation that—this was the foundation that I was going to get at is he indicated that first of all the FBI did not say—

THE COURT: Well, you can go into those things with him. We had the statement that somebody else had under the same circumstances, we admitted that.

MR. HUSK: I understand that, Your Honor, but in that instance that was adopted entirely. This one—

THE COURT: The same problem. You can go through that with him later on about it. How it was prepared and whether everything they said got in there or just these things, so forth, you know.

[936] MR. HUSK: My problem, Your Honor, this would be like submitting a police report. It is hearsay and it is authored by the defense, and you know, I think it starts opening some—a Pandora's box if we start allowing individual reports to go to the jury.

I don't have any—he has established what was said in this and I don't have any problems with him bringing that out during testimony, but to actually admit the report itself I think in this particular instance is most inappropriate. It would be like a police report.

MR. TREBON: Your Honor, there is a separate rule on police reports.

THE COURT: Well, we will find out, because we are going to discuss the police reports next.

Well, it seems to me that the—are you—you will be cross-examining about this as well—or examining on this on redirect, weren't you?

MR. HUSK: Right, Your Honor. My only objection to it is it being submitted to the jury. Again it's—it's like submitting a police report to the jury.

THE COURT: Well, and of course under certain occasions someone can submit a police report.

Well, I will withhold admitting it until after Mr. Husk's examination.

Now, let's go back again to some of the other problems [937] that we have and that I see coming. We might as well try to talk about them.

We have had questions about the police report and whether or not statements were made or not made in the police report.

At some time we are going to have the problem of whether all or some part of the police report is admissible and we are going to—we might as well be thinking about that, so that we can try to discuss—consider those matters over the recess, because sometime, it seems to me, we are going to get into Rule 106, a part of a writing. And as to whether other portions of that police report ought to come in. And also whether or not some of the statements in the police report—Mr. Trebon has selectively used some of them—whether some of the statements in there are admissible as prior consistent statements.

MR. TREBON: As it turns out from my review of the police report over the break in light of the Court's ruling so far, the only statement I'm going to bring out in the police report is how he was picked up.

THE COURT: You already brought out some others, Mr. Trebon, already, so I am simply saying we are going to review that at some time as well.

MR. TREBON: They are all covered by my statement, so I'm going to rest my impeachment on Cory Kay's prior [938] statement.

THE COURT: Well, you have already gone into the police report and in fact suggesting that some of the stories are of recent fabrication, so that is something we will consider later on, Mr. Trebon, now—and as to particular parts of it. So, that is something else that we have to talk about.

And one of the problems, of course, is, as I say, that we are now getting into the principal part of our proceeding is becoming Mr. Kay, rather than the charges against this gentleman.

MR. TREBON: That is certainly my concern.

THE COURT: And you are not doing anything that eases that fact, Mr. Trebon.

MR. TREBON: Tell me what to do.

THE COURT: No, I'm not telling you what to do. I am telling you we are here and we are going to work through it as best we can under the rules.

The other matter that you wanted to get into was Mr. Kay's withdrawal or what he did say with respect to not wanting to pursue the matter.

MR. TREBON: Right.

THE COURT: And I will permit you to do that. And then I will permit Mr. Husk to go into other matters related to that.

But arguably, the jury could think that the fact that [939] he didn't want to press the charges might somehow implicate his credibility, or his truthfulness here with respect to those charges.

So if you want to bring that in or up, why then we can see where that leads us.

MR. TREBON: Still stay away from Sampson Yazzie and Morris Singer?

THE COURT: Pardon?

MR. TREBON: I'm still not to mention Sampson Yazzie and Morris Singer in terms of charges against them?

THE COURT: First off, with respect to Mr. Singer, there is certainly no motivation there that I can see because Mr. Singer admitted that he had sexual relations with Mr. Kay.

And, I think that that at the moment, at least—yes, we will stay away from that, just as we would stay away from Mr. Hadley's aspects of those interviews.

MR. TREBON: Okay.

THE COURT: All right?

Well, that's where we are. Are we ready for the jury then? Okay, let's have the jury in.

(Whereupon the jury is returned to the jury box.)

THE COURT: All right, thank you. Then we will go on.

(Whereupon the witness resumes the witness stand and testifies further as follows:)

[940] CROSS EXAMINATION (Cont'd)

BY MR. TREBON:

Q. Mr. Kay, when you signed this statement on October 6 of 1988, it was read to you before you signed it; isn't that true?

A. Yes.

Q. And, everything in that statement was true at the time that you signed it; isn't that true?

A. No. There is just one other part where—

Q. Okay. Are you referring to—there was one part that you didn't agree with and you crossed it out; is that right?

A. Yes.

Q. And is that on paragraph 16 of the last page?

A. Yes.

Q. And, the lines that you didn't agree with you crossed out and put your initials on; is that right?

A. Yes.

Q. Do you see that on paragraph 16 where the line is crossed out and your initial is there?

A. Yes.

Q. Okay. Is that the part you are referring to that wasn't true?

A. Go on.

Q. Pardon me?

A. Go on.

[941] Q. That's the part that you crossed out that wasn't true; is that right?

A. Yes.

Q. All the other statements in this—in this statement are true; is that right?

A. Yes.

Q. And the things that I wrote down, this is in my handwriting; isn't it?

A. Yes.

Q. And I wrote this as you were talking to me; is that right?

A. Yes.

Q. And I wrote these things down because you didn't want me to use a tape recorder; is that right?

A. Yes.

Q. And, I wrote the things down as you told them to me, correct?

A. Yes.

Q. But then we read them to you before you signed the statement?

A. Yes.

Q. And all the other statements in this document, except for the part that you crossed out are true and correct; isn't that right?

A. Yes.

[942] Q. And that all the other statements in here are things that you really told us; isn't that true?

A. Yes.

Q. Okay. I'm going to ask you to read the statement at this point. Can you read it in English or is that difficult for you to do?

A. Which paragraph?

Q. Let's say if you start with paragraph one?

A. I can read it, but right now I do not want to.

Q. All right. Well, in paragraph one you told us that, "About 9:00 o'clock p.m. that you met Sampson Yazzi, Arnold Dohi and Morris Singer and Mr. Hadley at the Circle K in Kayenta. I was buying a pack of cigarettes and it was winter." Is that right?

A. Yes.

Q. And paragraph number two, you say that, "Sampson Yazzie was a Navajo and an adult. He had short styled hair, he was tall"?

A. Yes.

Q. "Arnold Dohi was a Navajo and an adult. He had short black hair. He was of medium height"?

A. Yes.

Q. "Morris Singer is a Navajo and an adult. He had short brown hair. He was small"?

A. Yes.

[943] Q. "Verl Hadley was a Navajo and an adult. He had short black hair. He was medium"?

A. Yes.

Q. These are all things that you said, right?

A. Yes.

Q. "There was about 10 more people at the Circle K, they were all Navajo males, they were adults. I don't know their names"?

A. Yes.

Q. Paragraph three says, "We all went to Verl's house, someone said, 'let's go party,' so I came along for the party"?

A. Yes.

Q. Paragraph four says, "I had drank alcoholic beverages before. I knew I was going to drink." Is that right?

A. I can't remember.

Q. Okay. Paragraph five says, "I had several mixed drinks at Verl's trailer. Everybody was drinking, about 14 or 15 people. I got drunk. I had about four drinks"?

A. More than four drinks.

Q. You had more than four drinks. Number six, "Then I passed out. I was passed out for several hours. When I woke up all of my clothes were off"?

A. Yes.

Q. Number seven, "I assumed Verl had sex with me, since he [944] was the only one there when I woke up. I was still drunk when I woke up"?

A. Yes. And he gave me another can. He gave me another can of beer after I waked up.

Q. At this point, Mr. Kay, I am just asking you to go over the statement to see if these are things that you told us.

Number eight says, "I assumed someone had messed around with me, because I had hickey's on my neck, my penis hurt too, my butt hurt too"?

A. Yes.

Q. Number nine, "I wasn't awake when anyone had sex with me or messed around with me." Is that right?

A. Part of the time.

Q. That's what you said back on October 6, at least, isn't it?

A. Yes.

Q. Number 10 says, "I can't remember the date when this incident occurred—that this incident occurred." Is that right?

A. Yes.

Q. Number 11, "We all stopped at the Thriftway store, after we met at Circle K?

A. Yes.

Q. Number 12, "The FBI said if I won the criminal case, I could sue Verl"?

[945] A. Not really.

Q. Is that what you told us on October 6?

A. Well, not for the money, though.

Q. What would you sue him for?

A. Sue him for what he did.

Q. Number 13 says—you sue someone for money, don't you?

MR. HUSK: Objection, Your Honor, calls for a legal conclusion.

THE COURT: Sustained.

Q. BY MR. TREBON: Number 13 says, "The FBI said Verl did this with other people too"?

A. Yes.

Q. Number 14 says, "I talked with the FBI three times"?

A. Yes.

Q. Number 15 says, "The time described in the statement is the time I told the FBI about being in different positions with Verl parenthesis (on stomach, on back, on hands and knees and on his lap) period"?

A. Yes.

Q. 16, "I was told that someone else could repeat what I said about Verl at trial"?

A. Yes.

Q. And you crossed out the part that says, "And that I wouldn't have to be there." Is that right?

A. Yes.

[946] Q. And then finally, the statement says, "I have read the statement. It is true and correct, it is what I told Mr. Trebon. I did not want him to use a tape recorder. Mr. Trebon read the statement to me. Dated October 6, 1988." Is that right?

A. Yes.

Q. And then it has your initials?

A. That's right. And how about that other one, the one—

THE REPORTER: Say again?

A. There is one other paper with him and he wanted me to sign it.

Q. What other paper would that have been?

A. You wanted me to drop the charges.

Q. You think I had such a paper? Could that have been—

A. I was there.

Q. —somebody else?

A. No.

Q. All right. Do you remember Ms. Linton being there?

A. Yes. She was walking over to the trees at that time.

Q. Okay. So everything that you told us and that was in that statement was true and correct on October 6; is that right?

A. Yes.

MR. HUSK: Objection, that's been asked—

THE COURT: That's been asked and answered.

[947] Q. BY MR. TREBON: Isn't it true that, Mr. Hadley(sic), rather than me showing you a piece of paper that an officer by the name of Ruben Wiseman in February of 1986, or January 31 of 1986, talked to you about this case?

A. No.

Q. You don't remember that? Do you remember at that time that you signed a piece of paper with him that said that you would not willingly testify in this case?

A. I don't remember.

Q. Do you remember that you—

THE COURT: Well, now just to clarify it. It wasn't in this case.

Q. BY MR. TREBON: I'm sorry, in the case that—in the report that you brought with the Navajo Division of Public Safety involving the same incident?

A. Yes.

Q. That would have been a case with the Navajo Tribe?

A. Yes.

Q. In Navajo Trial Court; is that right?

A. I think so. I don't remember.

Q. But it involved the same incident that took place on September 5 of 1985 with Mr. Hadley, correct?

A. That's right.

Q. And, isn't it true that you refused to testify in that case.

[948] MR. HUSK: Objection, Your Honor, as to the form of the question.

THE COURT: I think the question was before as you described it. That he said he would not willingly testify.

Q. BY MR. TREBON: Is it true that you told him that you would not willingly testify?

A. Yes. I didn't want to. I didn't want to go through it.

Q. Okay. Why was that?

A. Because we didn't have a vehicle. We didn't have a vehicle at that time. And I didn't know that—I didn't know that they can bring you up here.

Q. Did you—did he refuse to give you a ride to court, the officer?

A. I don't remember.

Q. Did you testify here on Friday that the officer involved in the case refused to give you a ride to Court?

MR. HUSK: Objection, Your Honor, that is a complete mischaracterization of what the testimony was.

THE COURT: I will sustain the objection at this time.

Q. BY MR. TREBON: Didn't you say on Friday here that you couldn't get a ride from the officers to go to Court?

A. Yes.

Q. So the reason that you dropped the charges then, in Navajo Tribal Court, not here, but in Navajo Tribal Court, in [949] 1985, is because you couldn't get a ride to court. Is that what you are saying?

A. Yes.

Q. And the officers involved in the case wouldn't help you get a ride; is that right?

A. Yes.

Q. Isn't it true that in 1985 that you were also taken to see a doctor at the hospital?

A. Yes.

Q. And at that time, isn't it true, that you discovered that you had venereal warts?

A. Yes.

Q. And isn't it true that you had to get some treatment for those?

A. Yes.

Q. When you talked to officers within the Navajo Division of Public Safety, you were 16 years of age at that time, weren't you?

A. Yes, I think so. I don't remember.

Q. Did the FBI tell you that you wouldn't have to testify at trial if you made a statement against Mr. Hadley, that somebody else could do that for you?

A. Yes.

MR. TREBON: May I have just a moment, Your Honor?

THE COURT: Uh-huh.

[950] MR. TREBON: No further questions, Your Honor.

THE COURT: All right, thank you.

Mr. Husk?

* * * *

[1337] Q. Mr. Hadley, have you provided students rides in your vehicle during your teaching at Chilchinbeto?

A. When I was—yes.

Q. And isn't it true that you provided rides to students on a regular basis to the Kayenta swimming pool?

A. Approximately once a month.

Q. Did you ever provide rides to students who may have been at the Thriftway store?

MR. TREBON: Objection, Your Honor, relevancy.

THE COURT: Overruled.

THE WITNESS: Any students in particular or?

Q. BY MR. HUSK: Any students in general?

A. I knew some high school students that were—that would be—that would—that would be at the Thriftway Store yes.

Q. Say students from the ages of 10 to 15 years of age, did you ever provide students rides in—just in the Kayenta area, what is commonly known as cruising, with students of that age?

MR. TREBON: Objection to foundation.

THE COURT: Overruled.

[1338] THE WITNESS: Most of the students I knew in Kayenta were high school students.

Q. MR. HUSK: I understand that, but that wasn't my question. My question said between the ages of 10

and 15, have you ever provided rides to those students where you just went cruising around Kayenta in your car?

A. I don't believe, no.

Q. So if there were students within that age group that said that they had—

MR. TREBON: Objection, Your Honor, may we approach the bench?

THE COURT: Certainly.

DISCUSSION AT BENCH

MR. TREBON: Your Honor, I object because these questions are irrelevant, number one. Number two, there has been no testimony from anyone in Mr. Husk's case or during our case that there are rides provided to students at the school and if he is trying to set up impeachment on a collateral matter, I object to that, because those would be other bad acts that he's never sought in his motion to introduce and weren't introduced yet, so far. I object if they are introduced, if they come later, but to ask Mr. Hadley about them now to—it's collateral, I think they are irrelevant to ask Mr. Hadley now.

[1339] THE COURT: I don't understand that line of reason.

MR. TREBON: There has been no testimony from any of the witnesses.

THE COURT: Why would there have to be? He can ask this man first, can't he?

MR. TREBON: To get a denial simply so he can—no, I don't think he is allowed to ask this witness matters that have nothing to do with this case, just so he can bring in witnesses at a later time to try to impeach him on a collateral matter.

THE COURT: Whether it would be collateral or not, seems to me it has relevance and he is entitled to cross-examine him about matters that are relevant to all of these discussions that we have been having and he brought out incidents involving that. You brought up the Thrift-

way Store. I think also every time he answers a question "I don't believe so," Mr. Husk is entitled to pursue him. That is not an answer. And he did that repeatedly with you.

MR. TREBON: His answers—his question is vague as well.

THE COURT: Well, in your questions he said innumerable times "I don't believe so."

MR. TREBON: Well, we are here on his objection—my objection to his question now.

THE COURT: Your objection is overruled.

[1340] MR. TREBON: The question is vague about whether or not—what time is he referring to?

THE COURT: Find out whether this was this age, that age, or whatever.

MR. HUSK: Certainly.

THE COURT: All right, let's proceed on.

(End discussion at bench.)

Q. BY MR. HUSK: I believe you testified that you have not ever provided rides to children from the Thriftway Store around Kayenta within the age group from say 10 to 15 years of age. Was that your testimony?

MR. TREBON: Your Honor, I object to foundation as to when this incident took place.

THE COURT: This is ever and then we can—

MR. HUSK: I will narrow it down.

THE COURT: Then we will pursue it further.

THE WITNESS: I might have on certain occasions, dropping them off at their home or something of that nature.

Q. BY MR. HUSK: Okay. So earlier when you said that you did not, that was not accurate; is that correct?

MR. TREBON: Objection, Your Honor, asked and answered.

THE COURT: His answer before was "I don't believe so," so let's proceed on.

Q. BY MR. HUSK: Have you ever had any of your current students over to your home?

[1341] MR. TREBON: Objection, Your Honor, as to particular persons involved.

THE COURT: Well, rephrase the question, because we are going to get into quote "current students" and we know he is not teaching.

Q. BY MR. HUSK: Have you ever had any minor male students between the ages of 10 and 15 years of age over to your house as a guest?

MR. TREBON: Object as to relevance.

MR. HUSK: It's irrelevant?

THE COURT: Well, now, both of you. Now I'm the one that makes the rulings. The objection is overruled.

MR. HUSK: Thank you, Your Honor.

Q. BY MR. HUSK: Did you understand my question?

A. Repeat it, please.

Q. Have you ever had any minor male students between the ages of 10 and 15 years of age over to your house as guests?

A. Well, my nephews are in that age range, yes, they would come over.

Q. Have you ever had Amadee Roy over to your house?

A. No.

Q. He's never been to your house?

A. No.

Q. Have you ever had any people, other than relatives within that age group over to your home?

[1342] A. No, I don't believe so, no.

Q. Have you ever provided alcohol to any minor students at your home?

MR. TREBON: Objection, Your Honor.

THE COURT: Overruled.

MR. TREBON: My objection is relevancy grounds.

THE WITNESS: I confine my use of alcohol to those persons who are 18 or over.

Q. BY MR. HUSK: That wasn't my question.

Have you ever provided alcohol to students that are minors under 18 years of age—under 21 years of age?

A. No, I don't believe so, not in my home.

Q. Have you done it anyplace else?

A. No.

Q. Isn't it true, Mr. Hadley, that you have a reputation for touching some of the male students in your classes?

MR. TREBON: Objection, Your Honor, may we approach the bench?

DISCUSSION AT BENCH

MR. TREBON: Your Honor, I think the record should show my strongest objection to all of these matters. This is a character assassination. If he's going to prove him guilty of something that is supposed to be the charges in the case, not did you do this or that, no.

THE COURT: Do you think, Mr. Trebon, he's confined to [1343] asking him whether he had sex with X? I don't think so. I think he is entitled to go into all these matters, particularly in view of your examination and his answers that would paint himself as something who doesn't do any of these things and hasn't done any of these things and they are all relevant insofar as his activities are concerned with these students and whatever.

MR. TREBON: And especially the reputation thing. That is strictly character, strictly forbidden by 404. He can't ask him—

MR. HUSK: He puts his character in issue when he takes the stand.

MR. TREBON: For truth and veracity alone.

THE COURT: I think any character trait is irrelevant, but in any event—

MR. HUSK: My particular angle, Judge, is he brought out through his witnesses that this man never touches any students, people.

MR. TREBON: I have?

MR. HUSK: You had witness from the school that said they never saw that.

THE COURT: Are you going to have somebody say that that is his reputation?

MR. HUSK: Yes, I am.

THE COURT: I will overrule the objection.

[1344] MR. TREBON: Let the record show not only my objection, I believe that it violates the rule on character and I believe that it turns the case into a character assassination case. In the event the stuff comes in, I move for a mistrial. And I would like the record to show a continuing objection.

THE COURT: You make objections as you consider it appropriate, but I would do it less obstreperously. It looks like you are going down for the 9th count, so just object and if you want a side bar, come up. We are not in final argument yet, so save it for those times.

MR. TREBON: All right.

(End of discussion at bench.)

Q. BY MR. HUSK: Isn't it true, Mr. Hadley, that you have a reputation for touching the male students in your classes?

A. Could you define touching, please?

Q. Sure. Isn't it true that you have a reputation for tickling male students in the chest area?

A. I believe in a playful manner, or if I am instructing in a classroom.

Q. Mr. Hadley, I asked the question, if you would just restrict yourself to answering that question.

A. In a playful manner.

Q. And isn't it true that you also have tickled students in the back area?

MR. TREBON: Your Honor, I object on relevancy grounds. [1345] I would like the record to show a continuing objection, so that I don't have to object to each question.

THE COURT: Well, with respect to touching in the back you can have a continuing objection. Anything else we will discuss as we go along. The objection is overruled.

Q. BY MR. HUSK: You also tickle—have a reputation for tickling students in the back area; isn't that true?

A. In a playful manner.

Q. Isn't it also true that you have a reputation for tickling students in the thigh area?

MR. TREBON: Same objection.

THE COURT: Same ruling.

THE WITNESS: In a playful manner.

Q. BY MR. HUSK: Do you think it is appropriate behavior for a teacher to tickle his or her students even in a playful manner?

MR. TREBON: Objection, irrelevant and argumentative.

THE COURT: Overruled.

THE WITNESS: Certainly not in the classroom. However, outside on the playground where there is a less restricted area, I think it is appropriate.

Q. BY MR. HUSK: Mr. Hadley, you testified that you were the acting principal for a period of time; isn't that true?

A. Yes, I did.

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[1353] Q. You never allowed any minor students to drive your vehicle, any minors, any people that did not have a license?

[Mr. Hadley]: No.

MR. HUSK: Your Honor, may we approach the bench?

DISCUSSION AT BENCH

MR. HUSK: Your Honor, I have here a list of citations received by the defendant. One on 5-19-1976 in which he was cited for allowing an unauthorized person to drive his vehicle. The Government is prepared to present the witness—the testimony of the Department of

Public Safety officer, who [1354] provided that citation, who will indicate that the person driving that vehicle was a minor and that he was so cited. I would ask at this point in time the opportunity to impeach the witness regarding that, based on his assertion.

MR. TREBON: Your Honor, number one, he needs to have a certified copy of a conviction.

MR. HUSK: Not for impeachment. I can ask him.

MR. TREBON: You can ask him if he was convicted, but he has to stand by the answer. I don't think you have to show the piece of paper.

MR. HUSK: I am prepared to do that, or certainly allow—or to rely on the officer coming in to testify later on.

MR. TREBON: That doesn't indicate it is a minor person, so I would object to him showing him that particular document.

MR. HUSK: I can ask him the question, I believe, Your Honor.

THE COURT: Well—

MR. TREBON: I also think that this again is a collateral issue, that under 403 is confusing to the jury, they are not particularly pertinent to any issue in the case.

THE COURT: Was he in the car or any of those kind of things?

MR. HUSK: Yes, he was.

[1355] THE COURT: On that occasion?

MR. HUSK: Yes, he was.

THE COURT: Well, since it's in the nature of the same kind of acts, so forth, I think it may have some relevance, so I will overrule that objection. But you avow, Mr. Husk, that you have a witness who will come now and with the records and be able to establish that, when it happened, and that that—and the details of it by certified copy of the police records?

MR. HUSK: I'm not sure I have certified copies of the police records, but I have a copy of the citation. The officer can recall distinctly Mr. Hadley. He will be able to

identify Mr. Hadley, will be able to indicate he gave him the citation on that date, and describe the circumstances under which it was issued.

MR. TREBON: I don't believe that that is probative. You are not allowed to bring in extrinsic evidence for impeachment.

THE COURT: I think for the defendant it may be true—or for a general witness. I think I have allowed it here. But where you get somebody that is even a percipient witness, important witness, I think you can bring in extrinsic evidence. You know, it is—it happens regularly, for instance, where there is a government informant, they impeach them on everything from the kitchen to the sink.

MR. TREBON: Your Honor, unless he's got a conviction [1356] document, certified copy of a conviction, then I would object to having a DPS officer coming to testify about the fact of the case.

THE COURT: The DPS officer can testify that he stopped him, what he saw, what he observed, so forth, so I will overrule the objection. All right.

(End of discussion at bench.)

Q. BY MR. HUSK: Mr. Hadley, isn't it true that on May 19th of 1976, in the Monument Valley area, you were stopped by an Arizona Department of Public Safety officer and cited for allowing an unauthorized person to drive a vehicle and that person was in fact a minor; isn't that true?

A. That's true. I understood the question—I understood the question previously that I thought you were making a reference to my students at Chilchinbeto Day School.

Q. Who was that person that you were allowing to drive the vehicle?

A. I believe the kid's last name was Vanarsdale or something like that. Vanarsdale or something. It's been some time I don't remember his first name.

Q. Was he a relative?
A. No.
Q. Had he been asking to drive your vehicle?
A. Excuse me?
Q. Had he asked you to drive your vehicle?
[1357] A. Yes, he did.
Q. And how old was he?
A. I don't remember his exact age.
Q. General age?
A. 13, 14 maybe less, I don't know the exact age.
Q. And was he a student of yours at the time?
A. No.
Q. Was he a former student?
A. No.
Q. He was not a student at all at Chilchinbeto School?
A. No.
Q. Had he been a student at Kayenta?
A. I believe he was a student at the Kayenta public schools.
Q. Is that how you had met him through your association with the school?
MR. TREBON: Objection relevancy, Your Honor.
THE COURT: Overruled.
THE WITNESS: Most likely, yes, because I worked there at the school seven years prior to working at Chilchinbeto.
Q. BY MR. HUSK: Again I ask you, Mr. Hadley, wasn't that a little unusual to allow a minor to operate your vehicle?
MR. TREBON: Objection, relevancy.
THE COURT: Well, I will sustain the objection, it is argumentative.

• • • •

[1375] Q. Mr. Hadley, isn't it true that you felt you were a hindrance to society, because of your attraction to young male children?
A. That is not correct.

Q. And do I understand your testimony to be that you have never engaged in any sexual acts with minors?
MR. TREBON: Objection, Your Honor.
THE COURT: Answer the question.
MR. TREBON: May we approach the bench?
THE COURT: Surely.

DISCUSSION AT BENCH

MR. TREBON: I object again, these are questions that go to propensity, character, and do not relate to anything specific in the case. He can't ask open ended questions about whether or not there has been any prior bad acts in his life, or whether or not he's had any homosexual relations or anything. I move the question not be allowed, that he be advised not to answer it, and any more questions. Based on this and the other questions that were asked on direct(sic), that we were at the bench about, and the ones following those that I objected to on relevancy, I move for a mistrial.
[1376] THE COURT: Mr. Husk?
MR. HUSK: My position is that Mr. Trebon questioned him regarding his prior sexual activity with minors. I'm certainly entitled to come back and ask him if he's had sex with minors before. Based on that statement, there may be prior bad acts that may become admissible. But until that's established I'm not in a position to go into it.
THE COURT: I think you did go into those matters, Mr. Trebon.
MR. TREBON: I didn't ask him whether or not he ever had sex with anyone.
MR. HUSK: I said minors I didn't say with anyone.
MR. TREBON: I didn't ask him if he ever had sex with any minors. I asked about people involved in the case only.
THE COURT: That's true.
MR. HUSK: I'm not restricted, Your Honor?

THE COURT: I think his having sex with minor children and at least in Amadee Roy's case, anal intercourse, that is something that Dr. Bendheim certainly thought was some kind of characteristics, at least in this field, and unusual, that that has relevance. And I think we have to keep in mind also as we go through this process, that with respect to 608 and 611(b), and I don't see this as that problem, he has a right to—with respect to purely credibility matters, that he couldn't have anticipated, and the right to object to those [1377] kind of matters, but insofar as this is concerned, certainly it is a broad question. But, I think that you have the right to ask, if you have specifics. I think it would be much better certainly insofar as the—

MR. HUSK: My intent, Your Honor, is to ask the general question and then come down to the specifics.

MR. TREBON: Those would be—prior bad acts have never been allowed by the Court. You can't ask about unsolicited prior bad acts, open ended questions, it is not—none of it is admissible under 404.

MR. HUSK: We know what the answer is going to be. It's going to establish that he is—

MR. TREBON: Why are you asking the questions?

MR. HUSK: Because I am laying the foundation for the rebuttal.

MR. TREBON: I don't think he is allowed to do that. I think the Court is going to get in a position of clearly reversible error to ask the questions and solicit—

THE COURT: He can impeach. This isn't calling someone to impeach them, knowing they are going to give a false answer or give an answer, that is what he knows it is going to be. You can tell that from what he is saying now, all of these things, so let's proceed and then get to specifics. I think it is appropriate that we do get the specifics.

MR. HUSK: I will ask the one question and I will get [1378] to the specifics.

MR. TREBON: Before the specifics, the Court should have a hearing outside the presence of the jury about the appropriateness of any prior bad act testimony.

MR. HUSK: I don't intend to bring prior bad acts. I am asking one question. If he's ever had any. I think that is different from introducing prior bad acts. I certainly intend to have such a hearing prior to anything coming in before the jury.

THE COURT: All right. On that basis, I will—

(End discussion at bench.)

Q. BY MR. HUSK: Mr. Hadley, is it your testimony here today that you have never had sexual intercourse with any minor males?

A. That's correct.

Q. And is it your testimony here today, specifically, that you never engaged in anal intercourse with Amadee Roy?

A. That's correct. I did not.

Q. And is it your testimony here today that you never engaged in anal intercourse with Cory Kay?

A. I did not.

* * * *

[1663] DIRECT EXAMINATION

BY MR. HUSK:

Q. Will you state your name for the record, please?

A. Kyle Hartman.

Q. And, Kyle, where do you currently reside?

A. In Durango, Colorado.

Q. And, Kyle, you understand you have previously been sworn as a witness and have taken an oath to tell the truth?

A. Yes, I do.

Q. And you realize you are still under oath?

A. Yes, I do.

Q. How old are you, Kyle?

A. I am 27.

Q. And, can you tell us the education that you have had, if any?

A. I have a Bachelor of Arts degree in music, which I received in April of '87 and I graduated cum laude.

Q. Where did you attend elementary and high school?

A. In Kayenta, Arizona.

[1664] Q. And what grades did you attend there in Kayenta?

A. First through 12th.

Q. Did you end up graduating from that school there?

A. Yes, I did. I was second in class rank.

Q. Is that Monument Valley High School?

A. That's correct.

Q. During the time that—or first of all, let me ask something in the way of background. How was it that you resided in Kayenta, came to reside in Kayenta?

A. My parents were employees of School District 27. My father was a librarian and my mother was a kindergarten teacher.

Q. Is School District 27 the Kayenta School District?

A. Yes, it is.

Q. At some point in time during your education, did you have an opportunity to meet the defendant, Verl Hadley?

A. Yes, I did.

Q. And what grade was it that you first met him?

A. 4th grade.

Q. 4th grade?

A. Yes.

Q. And approximately how old would you have been at that time?

A. About nine.

Q. Did you also have various occasions to come in personal [1665] contact with the defendant, Verl Hadley?

A. Yes, I did.

Q. And specifically, did you have occasion to have sexual contact with Verl Hadley?

A. Yes.

THE COURT: At this time, Mr. Husk, let me remind you, members of the jury, I read this instruction to you previously and let me give it to you again now.

You are permitted to consider evidence of other sexual conduct, which is not part of the charges of the indictment against Mr. Hadley here, only to the extent that they show motive, intent, preparation or planning.

Evidence that Mr. Hadley engaged in sexual relations with Mr. Hartman, if so found, cannot be established as any evidence or proof whatsoever, that he committed any of the acts, he, Mr. Hadley charged in the indictment before you.

That is to say, evidence that Mr. Hadley may have committed a similar act at an earlier time may not be considered by the jury in determining if Mr. Hadley is guilty of any of the offenses involved in this case.

In addition you may not use evidence of sexual acts between Mr. Hadley and Mr. Hartman to establish motive, intent, preparation or planning, unless you first find that the other evidence in the case, standing alone, establishes beyond a reasonable doubt that Mr. Hadley did the particular [1666] acts charged in the indictment before you.

If you should find beyond a reasonable doubt from other evidence in the case, not involving Mr. Hartman, that Mr. Hadley did the acts charged in the indictment before you, then you may consider evidence of sexual acts between Mr. Hadley and Mr. Hartman to establish motive, intent, preparation or planning.

MR. HUSK: Thank you, Your Honor.

Q. BY MR. HUSK: Kyle, how did you know the defendant?

A. He was a teacher's aid in the intermediate department.

Q. What do you mean by intermediate department?

A. It was grades 4th, 5th and 6th.

Q. Did you have sexual contact with the defendant?

A. Yes, I did.

Q. And was that approximately on four different occasions?

A. That's correct.

Q. And from what time period did these instances occur?

A. 5th grade through my freshman year in high school.

Q. So that would have been 1972 or 1971-72?

A. Yes.

Q. And when was it that you graduated from high school?

A. May of 1981.

Q. So that would have been approximately 1977, '76, '77?

A. Somewhere around there, yes.

Q. Did one of those incidents occur, the first incident, [1667] occur at the defendant's home?

A. Yes, it did.

Q. And where was his home at the time?

A. At Baby Rocks.

Q. Was it a—what type of home was it?

A. It was a trailer.

Q. Do you remember the color of the trailer?

A. It was green and white.

Q. What occurred on this occasion? This would have been in the 5th grade; is that correct?

A. Yes. He had invited me out to his house and when I got out there, he wanted me to put on a pair of swimming trunks, which I did. And, when I came back out of the bedroom, he wanted me to lie down on the bed with him and take a nap. And he sort of tickled me, and sort of started wrestling with me, and the next thing I know, he put his hands down the front of the trunks that I had on and grabbed my penis and kept his hand there and then he asked if I wanted to feel his, and I said, no, I did not. And then he asked one or two more times, and I said, I didn't and I was able to—

Q. Were you able to leave then shortly thereafter to change?

A. Yeah. I don't remember how I got away, but I remember that I did. And I went into the other bedroom and changed back into my clothes and—

[1668] Q. Kyle, if I may ask you, I believe you indicated that you were nine in the 4th grade. Would you have been 10 years old at the time of this incident, in 5th grade?

A. Yes.

Q. Was there also a second incident between you and Mr. Hadley?

A. Yes, there was.

Q. And approximately how long after that first incident was the second incident?

A. I'm not sure. It might have been a year, give or take a couple of months, I'm not positive.

Q. Where did that incident occur?

A. That occurred at his trailer at Baby Rocks.

Q. Was anybody present on that occasion besides the two of you?

A. There was nobody else present.

Q. What happened on that occasion?

A. He wanted me to lie down on the bed with him again. He might have had me put the trunks on, I'm not positive. At any rate, he was lying behind me and took the trunks, or whatever it was I was wearing, off. And he then tried to make—put two or one or two of his fingers in my rectum, and he then proceeded to insert his penis inside of me and engaged in intercourse and ejaculated in me.

Q. Did he say anything to you while he was doing that?

[1669] A. He kept asking me to let him in.

Q. There was a third incident that occurred; is that correct?

A. That's correct.

Q. Where did that occur?

A. That occurred at my house.

Q. How long between the second and third incident?
A. It was about the same time frame.
Q. Approximately a year?
A. Approximately.
Q. What happened on that occasion at your home?
A. He had called up and I believe my mother had answered the phone. And, I talked to him and he wanted to come over. And I said that he couldn't, because, you know, my parents were still there, they were getting ready to leave for the weekend. And, he subsequently came over later on. And after he got there, he suggested that we go to my bedroom and get into bed and he tried to snuggle and then wanted to engage in intercourse again, which I told him I didn't want him to, and he did anyway.
Q. Did he use a lubricant on this occasion?
A. Yes, he did.
Q. Do you know what it was he used?
A. It was either lotion or vaseline, I don't remember.
Q. Did he engage in intercourse to the point of [1670] ejaculation on this occasion?
A. Yes, he did.
Q. There was also a fourth incident; is that correct?
A. That's correct.
Q. And was that the final incident?
A. That's correct.
Q. I believe you testified that this would have been when you were a freshman in high school?
A. That is also correct.
Q. Will you tell us about what happened on that occasion?
A. I had called him up and asked him to come over and he did, and he wanted to engage in intercourse and I didn't want to. And then he suggested that I engage in intercourse with him, which I did for approximately five minutes and I stopped and asked him to leave.
Q. Did you ever have any conversations with Mr. Hadley as to why this had occurred?

A. Yes. I had asked him why he had done this to me and he said it was because I was cute and that he still thought I was cute.
Q. Mr. Hartman, have you ever told anyone else about the details of this incident?
A. No, I have not.
Q. Did you discuss with the attorneys involved in this case the details which you related?
[1671] A. Yes, I have.
Q. When was the first time that you spoke with anybody about the details involving your activities with Mr. Hadley?
A. Last Thursday.
Q. And who was it that you spoke with?
A. I spoke with Bill Forsythe.
Q. And who is he?
A. He is an FBI agent from Colorado.
Q. Were you at all familiar with Mr. Hadley's case?
A. I had read of his arrest last summer when I was living in Phoenix.
Q. At that time, did you consider calling the FBI or the U.S. Attorney's office?
A. I had thought about it, but not on a very deep level or very seriously.
Q. What influenced you to provide this information at this point in time?
MR. TREBON: Objection, Your Honor.
THE COURT: Sustained.
MR. HUSK: I have no further questions.
THE COURT: All right, thank you. Mr. Trebon?

CROSS EXAMINATION

BY MR. TREBON:

Q. Mr. Hartman, you said that you first came forward with [1672] this evidence last week; is that right?
A. That's correct.

Q. And when were you interviewed for the first time by the Government's attorney?

A. Friday, after I got here to Prescott.

Q. That would have been last Friday?

A. That's correct.

Q. And, when was the first time that I ever got to talk to you about these events?

MR. HUSK: Objection, Your Honor.

THE COURT: You can establish when you talked to him.

MR. TREBON: That's what my question was.

Q. BY MR. TREBON: When did I get to talk to you?

THE COURT: No. Just the way—

MR. HUSK: Objection, Your Honor.

THE COURT: —the way the question is phrased is objectionable. You can ask him when you talked to him.

Q. BY MR. TREBON: When did I talk to you?

A. Last night.

Q. And was that the first time I talked to you?

A. Yes.

Q. And did I ask you then about who you knew and who your teachers were and where you have lived and questions of that nature?

A. Yes.

[1673] MR. TREBON: No further questions.

THE COURT: All right, thank you, sir. You may step down.

MR. TREBON: Your Honor, I request that we approach the bench.

THE COURT: All right.

DISCUSSION AT BENCH

MR. TREBON: Your Honor, I feel the procedure that —I must move for a mistrial, because the evidence is— I would so move. I would also point out too that with the Court's instruction, that question about that Mr. Hadley thought he was real cute, and that is why he did it, was absolutely inappropriate in every event and shouldn't have been allowed. That, with all the other evidence in, I believe is so prejudicial and inappropriate in this case, in light of the fact that intent is not an issue, that I ask the Court for a mistrial.

THE COURT: Well, with respect to the last question, we heard the same thing before and I don't recall any discussion about whether he would or wouldn't make that comment. If we would have discussed it earlier, we could have come to some conclusion, but in any event it is in the record and I don't think it will do anything more than highlight it now if we struck it. So the motions are denied.

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[EXHIBIT I]

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

(Case No. 88-127-EHC)

U.S.A.

v.

VERL HADLEY

INTERVIEW WITH JONATHAN TSOSIE

March 29, 1989

JT Hi. What is your name?

Jon Jonathan Tsosie.

JT I am going to ask you a few more questions. O.K. Jonathan. Today's date is March 29, 1989. Is that right?

Jon Yea.

JT My name is John Trebon and I'm Verl Hadley's lawyer. I've told you that, right? And I'm talking to you where at, where are we at?

Jon Pause—no response to question.

JT At school?

Jon Yea.

JT What school is this?

Jon Chilchinbeto School.

JT And what grade are you in?

Jon Fourth grade.

JT O.K. And Dayna Linton is here. She's an investigator, right? I introduced you to her, right?

DL Hi Jonathan.

Jon No response to question.

JT Right?

Jon No response to question.

JT You need . . .

DL You have to say yes.

JT We want you to talk out loud.

Jon Yes.

JT O.K. And who else is with you today?

Jon Marlene Singer.

JT And who's Marlene Singer?

Jon No response to question.

JT Do you know who she is? Who is she?

Jon No response to question.

JT She's right there, I guess. Does she work at the school here?

Jon Yea.

JT O.K. Is she somebody you know? Do you know Marlene?

Jon Yea.

JT O.K. Um, I was asking, you said that one time last year Verl Hadley gave you a ride home from school. Is that right? You need to speak out loud.

MS Talk loud.

Jon Yea.

JT And that's because you missed the bus, is that right?

Jon Yea.

JT O.K. And why did you miss the bus again?

Jon No response to question.

JT How did you miss the bus?

Jon Getting my books and my coat.

JT O.K. and when you were getting your books and coat, the bus took off?

Jon Yea.

JT O.K. And Verl Hadley gave you a ride home to your house, is that right?

Jon Yea.

JT And you were living with your parents then, is that right?

Jon Yea.

JT Who's your parents? Do you know their names?

Jon John Tsosie.

JT Jonathan Tsosie.

Jon No. John Tsosie.

JT And John Tsosie, I'm sorry, your Jonathan aren't you? And your dad is John. Is that right?

Jon Yea.

JT And who's your mom?

Jon Laverne Tsosie.

JT Laverne Tsosie. Who are you living with right now?

Jon Eddie Roy and Josephine Roy.

JT Eddie Roy and Josephine Roy. And where is your house at? By White Mesa?

Jon Yea.

JT O.K. Is that pretty far from here or pretty close?

Jon Pretty far.

JT Pretty far. You can't walk that far, can you?

Jon Yea.

JT You can?

Jon No.

JT It would be a long walk, hah?

Jon Yea.

JT O.K. So you get a ride usually when you go that far hah?

Jon Yea.

JT O.K. Now you said that when you got a ride home with Mr. Hadley, you know Mr. Hadley's a teacher out here, I guess, right?

Jon Yea.

JT O.K. And how old are you?

Jon Nine.

JT O.K. And what grade where you in when he gave you a ride home?

Jon Third grade.

JT Third grade. And was it hot out or cold out when this happened?

Jon Hot.

JT But do you know what month it happened in?

Jon No.

JT O.K. And when Mr. Hadley gave you a ride home, you said that he touched you, is that right?

Jon Yea.

JT That he pinched you, I'm sorry.

Jon Yea.

JT That he pinched you. O.K. Where did he pinch you at?

Jon Right here.

JT O.K. Where did you point to, your arm?

Jon Yea.

JT O.K. Which arm?

Jon Left.

JT Left arm, and did he touch you anywhere else?

Jon No.

JT O.K. Did Mr. Hadley do any, why did he pinch you, do you know?

Jon No.

JT Did he say anything to you?

Jon No.

JT Is that the only time that Mr. Hadley has ever touched you?

Jon Pause—no response to question.

JT Has he touched you any other times? He he pinched you any other times?

Jon Sometimes.

JT Pardon?

Jon No response to question.

JT Is this the only time that you've ever got a ride home with him?

Jon Yea.

JT Has he ever touched you any other time?

Jon Yea.

JT When?

Jon Long pause—I don't know?

JT Has he ever pinched you any other time, I mean, by any other do you know what I'm saying? Sometime other than the time in the car?

Jon Yea.

JT You understand that? Has he pinched you any other time?

Jon Yea.

JT When was that?

Jon I don't know.

JT Where did he pinch you then?

Jon Long pause—no response to question.

JT You said he pinched you in the arm when you were getting a ride home. Is that right?

Jon Yea.

JT O.K. Is that the only time he's pinched you.

Jon No.

JT O.K. When else did he pinch you?

Jon Last year.

JT Pardon?

Jon Last year.

JT O.K. Some other time that you haven't told us about, yet?

Jon Pause—no response to question.

JT Was there another time?

Jon Hah?

JT Was there another time? Or just one time?

Jon Another time.

JT O.K. When was the other time?

Jon No response to question.

JT Do you know?

Jon No.

JT No. Where did he pinch you the other time?

Jon Right here.

JT On you leg.

Jon Yea.

JT Where at on your leg?

Jon Right here.

JT Right above the knee?

Jon No response to question.

JT Above the knee?

Jon Yea.

JT O.K. And which leg was that on?

Jon Right.

JT O.K. Um. Where were you at when that happened?

Jon In the gym.

JT Were there other people there too?

Jon Yes.

JT What were you doing in the gym? Was there a sporting event or something?

Jon No. Playing.

JT Playing what?

Jon No response to question.

JT Basketball?

Jon No.

JT What were you playing in there?

Jon Long pause—No response to question.

JT Tag? Do you remember what you were playing?

Jon Yea tag.

JT Tag. Is that where you touch somebody and then you try and touch somebody else?

Jon Yea. Their it.

JT And their "it", right? Their "it" until they touch somebody else?

Jon Yea.

JT Is that tag?

Jon Yes.

JT O.K. We use to pay tag when I was a kid too. So you still play that, ha?

Jon No response to question.

JT O.K. I'm sorry, can you answer out loud. You still play tag, ha?

Jon Yes.

JT And was Mr. Hadley playing tag too?

Jon No.

JT O.K. He just came up and pinched you on the leg?

Jon No.

JT Pardon?

Jon No.

JT What did he do?

Jon Long pause—I don't remember.

JT O.K. But you say he pinched you on the leg or touched you on the leg?

Jon Leg.

JT Leg, and that was in the gym?

Jon Yea.

JT With everybody else there too? A bunch of kids were in there playing?

Jon Yea.

JT O.K. Were there any other teachers in there too?

Jon Yes.

JT Who? What other teachers where in there?

Jon Long pause—No response to question.

JT Do you know their names?

Jon No.

JT But there were other teachers in there too?

Jon Yea.

JT O.K., and a bunch of other kids in there too, ha?

Jon Yea.

JT A lot of kids?

Jon Yea.

JT And did he say anything to you? Did he say hi Jonathan?

Jon No.

JT What did he say?

Jon Long pause—no response to question.

JT What did he say?

Jon Long pause—no response to question.

JT You don't remember?

Jon Yea.

JT Yea what?

Jon Pause—no response to question.

JT Do you remember or you don't remember?

Jon Don't remember.

JT O.K. But he said something to you, I take it, ha?

Jon Yea.

JT O.K. Was he playing with the kids in the gym too?

Jon Yea.

JT Ah. Was he supervising the kids?

Jon Yea.

JT O.K. Do you usually have, when you have a recess, where you on recess, is that why you were in the gym?

Jon Yea.

JT And do you usually have a teacher in there to supervise you?

Jon Yea.

JT Do you know what supervise means?

Jon Yea.

JT To watch over you, ha?

Jon Yea.

JT O.K. So Mr. Hadley was helping watch over all the kids in the gym?

Jon Yea.

JT Was he playing too?

Jon No.

JT He was just watching, ha?

Jon Yea.

JT Did he talk to kids in there too?

Jon Yes.

JT And are you one of the kids he talked to?

Jon Yea.

JT And when he was doing that, did he touch you or pinch you? He pinched you on the leg?

Jon Yea.

JT O.K. Did it hurt?

Jon Yea.

JT Did it hurt real bad? Or just a little?

Jon Just a little.

JT Was he kind of playing with you?

Jon Yea.

JT Just kind of teasing you a little bit?

Jon Yea.

JT O.K. Now when he pinched you in the arm in the car, was he just teasing you and playing with you a little bit then too?

Jon Yea.

JT O.K. Has Mr. Hadley ever hurt you?

Jon Yes.

JT By pinching you?

Jon Yea.

JT And has he ever done anything else besides that?

Jon No.

JT O.K. Any other times that he's pinched you?

Jon No.

JT Just those two times?

Jon Yes.

JT O.K. Is this what you told the F.B.I. about?

Jon Yes.

JT O.K. Now I ask you. Did the F.B.I. say anything to you about Mr. Hadley?

Jon Yes.

JT What did they tell you about him?

Jon Long pause—They said what did Verl Hadley do to you?

JT O.K. They asked you what he did to you, ha?

Jon Yea.

JT And how did they know he'd done anything to you?

Jon No response to question.

JT Do you know?

Jon Yes.

JT How?

Jon I don't know.

JT You don't know. Um. What did they . . . Did they say anything about Verl to you? That they knew he was a bad guy or that he hurt little boys or anything like that?

Jon Yea.

JT What did they say?

Jon Long pause—no response to question.

JT Can you tell me what they said?

Jon I don't know.

JT Did they say he was a bad guy?

Jon Yes.

JT Ah. Did they say that "we know he's touched other boys so we think he's done it to you too".

Jon Yea.

JT Is that what they told you?

Jon Yea.

JT O.K. Did they tell you who else he supposedly touched?

Jon Yes.

JT Who?

Jon Amadee Roy.

JT Amadee Roy. Who else?

Jon Pause—no response to question.

JT Did they say anybody else?

Jon No.

JT Did they tell you what he did to Amadee Roy supposedly?

Jon No.

JT They just said "we know that he touched Amadee Roy"?

Jon Yea.

JT Have you ever talked to Amadee Roy about this?

Jon No.

JT Did Amadee Roy ever tell you that Verl touched him?

Jon No.

JT Just the F.B.I. told you that, ha?

Jon Yea.

JT Do you remember the F.B.I. person's name that talked to you?

Jon Long pause—No.

JT O.K. Was the F.B.I. a white guy or was he an Indian guy?

Jon White guy and Indian guy.

JT There was an Indian guy too. Do you remember the Indian persons name?

Jon No.

JT Was he Navajo?

Jon Yea.

JT Did he speak Navajo?

Jon Yes.

JT Did you interview in English. Did you talk to them in English or Navajo?

Jon Navajo.

JT Do you understand English pretty well?

Jon Yes.

JT You understand everything I'm saying here today?

Jon Yes.

JT And if you don't understand something you can ask Marlene to help us out in Navajo, is that right?

Jon Yes.

JT O.K. What other things did they say about Verl Hadley? They said he was a bad guy though ha?

Jon Yea.

JT Did they say what they should do to Verl Hadley or that something has to be done with him or anything like that?

Jon No.

JT What else did they say? Can you tell me?

Jon I don't know.

JT Did they say that he was a bad guy before you told them that he pinched you?

Jon Yea.

JT Is that what they started talking to you about?

Jon Yea.

JT Did they say that we know that he's touched Amadee Roy. Did they say that he pinched Amadee Roy?

Jon No.

JT What did they say?

Jon Touch.

JT Touched. They said that he touched Amadee Roy, right?

Jon Yea.

JT And they told you that before you told them about Verl pinching you.

Jon No.

JT They told you that after?

Jon No.

JT Do you understand my question? When did they tell you that he touched Amadee Roy? At the beginning of the talk?

Jon Pause—no response to question.

JT When they first started talking to you?

Jon Yes.

JT O.K. Did they tell you about Amadee Roy before. Do you know what the word before means?

Jon Yea.

JT Did they tell you about Amadee Roy before you told them about Verl pinching you?

Jon No.

JT Pardon?

Jon No.

JT When did they then? When did they tell you about Amadee. When did they tell you that Verl had touched Amadee Roy?

Jon Long pause—no response to question?

JT At the beginning?

Jon Yes.

JT O.K. So was it before or after you told them about Verl giving you a ride home in the car?

Jon Yes.

JT Was it before or after that they told you about Amadee Roy?

Jon Before.

JT Before. O.K. Did they say that they knew something happened to you too?

Jon Pause—no response to question.

JT Did they say "well Jonathon we know that Verl touched you too"?

Jon No.

JT Did they say that they knew that something happened to you too?

Jon No.

JT Um. What did they say? Did they tell him that you have to tell us anything that you know about Verl Hadley? You have to tell us something bad about Verl Hadley?

Jon Long pause—no response to question.

JT Did they?

Jon No.

JT O.K. What did they say? Can you tell me what they said?

Jon I don't remember what they said.

JT Oh. Did they say anything like, you have to tell us something bad about Verl so that we can do something about him?

Jon No.

JT O.K. Did Amadee Roy tell them about you?

Jon Yes.

JT He did?

Jon Yes.

JT How do you know? Did they say that? Did they say "we know that Verl touched you because Amadee Roy told us that?

Jon Pause—no response to question.

JT Is that what they said?

Jon Pause—no response to question.

JT Did they say that?

MS Did they say that to you:

Jon What:

MS What he is questioning you. What he is saying to you.

Jon No.

JT Well how do you know that Amadee Roy told them about you?

Jon He told me.

JT Amadee Roy told you? Is that right?

Jon Yea.

JT When was that? When did he tell you that?

Jon Long pause—no response to question.

JT Before or after you talked to them?

Jon Before.

JT So you knew that they were going to come to see you ha?

Jon Yea.

JT Did Amadee Roy tell you what to tell them?

Jon No.

JT How did Amadee Roy know that Verl had pinched you? Or did he know that?

Jon Because I told him.

JT You told Amadee Roy. What did you tell Amadee Roy? That Verl pinched you on the arm?

Jon Yea.

JT In the car?

Jon Yea.

JT And that Verl pinched you on the leg in side the gym?

Jon Yea.

JT And that Verl—you said that Verl was just playing with you or teasing with you?

Jon Yea.

JT Is that the truth? Have you told us the truth? Do you know what the truth is? The word truth?

Jon Yea.

JT What does the truth mean?

Jon Pause—no response to question.

JT Do you know what that word means?

Jon Pause—no response to question.

MS What does true mean?

Jon Pause—no response to question?

JT Is that a hard word to describe? Truth means that you say what really happened, and not make believe. Is that what the truth is?

Jon Pause—no response to question.

MS What does true mean?

Jon Really happen.

JT O.K. Is everything that you told us today the truth?

Jon Long pause—no response to question.

JT Do you understand my question?

Jon No.

JT Ha?

Jon No.

JT Oh. You talked to us today, right?

Jon Yea.

JT Did you tell us the truth today?

MS Did you tell the truth?

Jon Yes.

JT Yes. When you talked to the F.B.I., do you know who I mean now by the F.B.I., the people who came to talk to you?

Jon Yea.

JT Did you tell them the truth too, or make believe?

Jon Long pause—no response to question.

MS When the F.B.I. question you, what did you tell them?

Jon Make believe.

JT Make believe. What do you mean? Did you make something up for the F.B.I.?

Jon Pause—no response to question.

JT Did you make up a story for them?

Jon Yes.

JT How come? Were you scared when you talked to the F.B.I.?

MS Were you scared of them? Is that why?

Jon Yes.

MS Then say "yes".

Jon Yes.

JT Were you scared when you talked to them? Are you scared when you talk to me?

Jon No.

JT Why were you scared of the F.B.I.? Were they kind of mean to you or did they make you feel uncomfortable?

Jon Uncomfortable.

JT They made you feel uncomfortable?

Jon Yea.

JT How? Can you tell me how they did that?

Jon Pause—No response to question.

JT Did they try to be nice to you?

Jon Try to be nice to me.

JT They did try?

Jon Yea.

JT But you were scared of them.

Jon Yea.

JT How come?

Jon Pause—No response to question.

JT What did you tell them that was made up; that was make believe?

Jon Pause—No response to answer.

JT Did you tell them that Verl had done bad things to you?

Jon Yes.

JT Was that make believe? Is that the part that was make believe?

Jon Long pause—no response to question.

JT Can you answer that please? Was that make believe?

Jon Yes.

JT O.K. Does that mean that Verl really didn't do bad things to you?

Jon Long pause—no response to question.

JT He pinched you on the arm, I guess, right?

Jon Yea.

JT And he pinched you once in the gym on the leg, is that right?

Jon Yea.

JT Did he do anything else or is that all he ever did to you?

Jon Ever did to me.

JT Pardon.

Jon Ever did to me.

JT That's all he ever did?

Jon Yea.

JT He didn't do anything else?

Jon Yea.

JT Did you tell the F.B.I. that he had done other things?

Jon Pause—Yes.

JT You did. And was that make believe?

Jon Pause—Yes.

JT O.K. And did you make things up because you were afraid?

Jon Long pause—no answer to question.

JT Did you make them up because you were afraid of the F.B.I.?

Jon No.

JT Why did you make them up?

Jon Long pause—no response to question.

JT Can you tell me why you made up bad things about Verl Hadley?

Jon Yes.

JT Tell me why?

MS Tell him, he is asking why.

Jon No response to question.

MS Tell him the reason why.

JT You don't have to be afraid, we're not, we just want you to tell us why. We're not going to do anything to you. You won't be hurt here. O.K.? Its safe to tell us. Do you know what that means? Safe? That means nothing bad is going to happen to you. We just want you to tell us why, so that we understand. Does that make sense? Can you answer out loud, please?

Jon Yes.

JT O.K. Why did you make things up about Verl Hadley?

Jon Long pause—no response to question.

JT Can you tell me why Jonathan? Can you tell me why?

Jon Pause—no response to question.

JT Are you afraid to tell me why?

Jon Pause—no response to question.

JT Can you answer that please? Are you afraid to tell me why?

Jon No.

JT O.K. Why? Did Amadee Roy tell you to make up stories about Verl Hadley?

Jon Yea.

JT Do you know why?

Jon No.

JT Was it your idea or was it Amadee's idea?

Jon No answer to question.

JT To make up stories about Verl Hadley?

MS Whose idea was it, you or Amadee?

Jon Mine.

MS What is the word for "shy"?

JT Tell me in your own words what he was saying. It was your idea to make up stories about Verl Hadley?

Jon Yes.

JT Why?

Jon Pause—no response to question.

JT We're almost done. I just want to know why? Would you please tell me why?

MS What was the reason?

Jon Long Pause—no response to question.

JT Why? Is that a hard question to answer?

Jon No.

JT Could you answer it then please? Why did you make up stories about Verl Hadley? Did somebody tell you to?

Jon No.

JT O.K. Why did you do it then? Can you tell me that?

Jon No response to question.

JT Did the F.B.I. want you to make up stories about Verl Hadley?

Jon No.

JT Did Amadee Roy make up the stories?

Jon No.

JT You did. Did you make up the stories?

Jon Yea.

JT How come?

Jon Because.

JT Because why? Because what?

Jon No response to question.

JT Do you like Verl Hadley?

Jon No.

JT Why not?

Jon Because he pinched me.

JT Because he pinched you?

Jon Yea.

JT So you wanted to get Verl Hadley in trouble?

Jon No response to question.

JT Were you mad at Verl because he pinched you?

Jon Yes.

JT On the arm?

Jon Yea.

JT And on the leg, right?

Jon Yea.

JT So you made up some other stories about him?

Jon Yes.

JT Things that he didn't do, hah?

Jon Yea.

JT And you did that to get back at him?

Jon No response to question.

JT To get revenge? Do you know what revenge is?

Jon No.

JT O.K. Lets say when someone does something to you, you do something back to them.

Jon No.

JT Do you know what I mean by that?

Jon Yea.

JT That's revenge. Did you do that to get back at him for pinching you?

Jon No.

JT Why did you do it? Cause you don't like him?

Jon Yea.

JT O.K. What stories did you make up?

Jon No response to question.

JT Did you make up stories that he touched you in other places?

Jon No.

JT What stories did you make up?

Jon That Verl pinched me.

JT That he pinched you.

Jon On my leg.

JT Is that make believe?

JT Is that make believe?

Jon No response to question.

JT That's not the truth, hah?

Jon Pause—Yes.

JT It's make believe?

JT Alright, I've turned the tape over here, um Jonathan and I'm just about done. I'd like to be done, but I'd would like to find out one more thing. Um, why did you make up the stories about Verl Hadley? I guess because you didn't like him, is that right?

Jon Yea.

JT But what you told the F.B.I. is stories that you made up. Is that right?

Jon Long pause—no answer.

JT Right.

Jon Yes.

JT O.K. And so you didn't tell them the truth?

Jon No.

JT And the stories that you made up was about him touching you. Is that right?

Jon Yea.

JT O.K. I guess my—one last question is. Did Amadee Roy want you to do this or was it your idea all by yourself?

Jon Long pause—no answer to question.

JT Did Amadee Roy want you to do this.

Jon No.

JT Did he tell you to do it?

Jon No.

JT But he talked to you about Verl Hadley and the F.B.I. before the F.B.I. came to see you, didn't he?

Jon Yea.

JT Did you talk to him about making up a story about Verl?

Jon Yes.

JT O.K. Did he think that was a good thing for you to do?

Jon No.

JT Did he tell you to do it?

Jon Long pause—no.

JT You just did it all be yourself?

Jon Yea.

JT Because you didn't like Verl?

Jon Yea.

JT Did you make up any other stories about him?

Jon No.

JT But what you told the F.B.I. were made up stories then. Is that right?

Jon No answer.

JT Is that right?

Jon Yes.

JT O.K. Is there anything else you can tell me about any of this? Anything I haven't asked you, anything else we should know?

Jon No.

JT Did you make up stories about Verl Hadley to help Amadee Roy?

Jon Yes.

JT Oh. How was that going to help him?

Jon Long pause—No answer.

JT How was that going to help him?

Jon Long pause—no answer.

JT Was it going to help—do you know that Amadee Roy is made—has told stories about Verl Hadley too, hasn't he?

Jon Yes.

JT He's talked to the F.B.I. too, hah?

Jon Yes.

JT So you thought—did you think your story would help back him up kind of?

Jon Yes.

JT O.K. Did Amadee Roy tell you that he made up stories about Verl Hadley too?

Jon Yes.

JT So the stories that he told about Verl Hadley were made up too, is that right—were make believe?

Jon Made them up too.

JT They made them up too. I'm sorry I just didn't hear what you said. They were made up too?

Jon No.

JT The stories that Amadee Roy said about Verl Hadley were made up stories too, isn't that right?

Jon Yea.

JT O.K. In other words, his stories were make believe, right?

Jon Yea.

JT They were not the truth, were they?

Jon Yea.

JT They were the truth or they were not.

Jon Not.

JT Not the truth. Did Amadee Roy tell you that the stories he told about Verl Hadley were not the truth?

Jon Yea.

JT O.K. When did he tell you that?

Jon No answer.

JT When you and him talked about Verl Hadley?

Jon In 87.

JT In 87 he told you that?

Jon Yea.

JT O.K. Did he tell you why he made up stories about Verl Hadley?

Jon Yes.

JT Why?

Jon Long pause—no answer.

JT Did he like Verl Hadley?

Jon Yea.

JT Why did he make up stories about Verl Hadley, do you know?

Jon No answer.

JT Was he afraid when he talked to the F.B.I.?

Jon No.

JT Do you know why he made up stories, do you know why he made up stories or not?

Jon Not.

JT You do not know?

Jon Yea.

JT You don't know?

Jon Yea.

JT He just told you that he did?

Jon Yea.

JT And you made up stories to help him out?

Jon No.

JT To help out Amadee Roy?

Jon No.

JT I thought that's what you already told me? You thought it would help him out—to back him up, is that right?

Jon Yes.

JT Did you talk to any other kids besides Amadee Roy about Verl Hadley?

Jon No.

JT Is he the only one?

Jon Yea.

JT O.K. Now—so what you told the F.B.I. wasn't the truth. Is that right?

Jon Yea.

JT Have you told us the truth today?

Jon Yea.

JT Ah, did Verl Hadley ever pinch you on the arm?

Jon Yes.

JT Did he pinch you on the leg?

Jon Yes.

JT Did he do anything else?

Jon No.

JT That's all he ever did?

Jon Yea.

JT He never touched you, ah in your private areas, did he?

Jon No.

JT O.K. You know what private areas are don't you?

Jon Yea.

JT O.K. Like where you go to the bathroom, is that a private area?

Jon Yea.

JT He never touched you there did he?

Jon Yea.

JT He didn't touch you there right?

Jon Yea.

JT Yea what?

Jon No answer.

JT Yes he didn't touch you there. Is that what you mean?

Jon No.

JT What do you mean?

Jon No answer.

JT Is it the true that he didn't touch you anywhere else besides your arm and your leg. Is that true?

Jon Yes.

JT O.K. He didn't touch you in the private areas then? Right?

Jon Yea.

JT Am I right? Is my answer right?

Jon Yea.

JT O.K. Alright, I hope that's clear.

MS Yea it is.

JT Alright, is there anything else that you have to tell me about any of this?

Jon No.

JT Is there anything else I should know?

Jon No.

JT O.K. Ah are you sorry that you made up stories about Verl Hadley?

Jon Yea.

JT That was a bad thing to do, hah?

Jon Yea.

JT It's important to tell the truth, isn't it?

Jon Yea.

JT And ah so the F.B.I. people should know that you didn't tell the truth, hah?

Jon Yes.

JT It would be unfair for Verl Hadley to get in trouble because of things you made up wouldn't it be?

Jon No answer.

JT Isn't that true?

Jon No.

JT It would be unfair for him to get in trouble because of things—no it wouldn't—do you think it would be O.K. for that to happen, hah?

Jon No.

JT What do you think? Would that be fair or not fair?

Jon Not fair.

JT Not fair. O.K. Is there any other little kids that I could talk to—any other students here that I could talk to find out about this? Do you know anybody else that knows about this?

Jon No.

JT Did Amadee Roy talk to anybody else besides you about Verl Hadley?

Jon Pause—no.

JT O.K. You're the only person that you know of? O.K. Alright if there's anything else to tell about Verl Hadley or the F.B.I. or Amadee Roy—about any of this later—can you tell Marlene about it? If someting else comes up? Can you talk to Marlene about it so that she can get a hold of us so we'll know?

Jon No answer.

JT Is that O.K.?

Jon No answer.

JT Is that O.K.?

Jon Yes.

JT O.K. So if you have something else to say, can you tell Marlene about it? Marlene Singer.

Jon No answer.

MS At some other times, when you want to say something else would you tell me? That's what he's asking you.

Jon No.

MS You won't talk to me?

Jon I'll talk to you.

MS O.K.

JT What did he say?

MS He says that he will come and talk to me.

JT Alright so you'll go and talk to Marlene if there's something else to say?

Jon Yea.

JT O.K. Um. Alright and the whole time that you talked to me you weren't afraid of me or anything were you?

Jon No.

JT O.K. And you've told me the truth today?

Jon Yea.

JT Alright. Well thank you very much. I will go ahead and terminate this interview then and we'll turn off the tape recorder. You know that we tape recorded this today, don't you?

Jon Yes.

JT O.K. And you heard your voice on the tape recorder, didn't you?

Jon Yea.

JT O.K. Thank you very much. And the time is what?

DL Twenty after four.

JT Twenty after four and I guess we started about what time?

DL Three thirty.

JT Three thirty. Alright. Is that about right?

Jon Yea.

JT Alright. Thank you.

(Certificate of Transcriber Omitted in Printing)

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

(Caption Omitted in Printing)

SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO GOVERNMENT'S MOTION IN LIMINE TO PERMIT EVIDENCE OF PRIOR BAD ACTS UNDER RULE 404(b)

Verl Hadley, by and through his attorney, submits the following supplemental memorandum in support of his "Response to Motion in Limine to Permit Evidence of Defendant's Prior Bad Acts", which was previously filed with this Court on December 7, 1988. In addition, this supplemental memorandum will also specifically address the permissibility of allowing evidence of the past sexual relationship between Mr. Hadley and Cory Kay in order to show motive or intent within the framework of the superseding indictment.

It is expected that excludable delay under Title 18 U.S.C. Section 3161(h)(1)(F) may occur as a result of this motion or from an order based thereon.

MEMORANDUM

We believe that this Court's potential decision to allow evidence of a prior sexual relationship between Mr. Hadley and Cory Kay as it relates to the issues of intent or motive within the parameters of the superseding indictment.

On Friday, May 5, 1989, this Court heard brief testimony from Travis Yazzie and Cory Kay. Since Travis Yazzie denied any sexual relationship with Mr. Hadley, the only potential witness to offer evidence in such a relationship is Cory Kay. However, the defense will be in a position to call other witness this week which will show that the sexual relationship between Cory Kay

and Verl Hadley did not exist. The defense will be in a position to call former Sgt. Ray Laughter, Navajo Division of Public Safety, and Rueben Wiseman, former officer of the Navajo Dept. of Public Safety. Both officers investigated the previous charges instituted by Cory Kay against Mr. Hadley, as well as, Morris Singer and Sampson Yazzie. No prosecution took place as a result of the charges and Mr. Kay eventually refused to cooperate with any prosecutorial efforts. Ultimately, we do not believe that sufficient evidence exists to support the charges instituted by Cory Kay.

Second, we believe that any prior bad acts admitted under Rule 404(b) of the Federal Rules of Evidence must relate to specific conduct. Evidence of the prior sexual relationship between Cory Kay and Verl Hadley, without application to particular acts, is inappropriate. Rule 404(b) relates to prior bad "acts", not the existence of a prior relationship. Moreover, it is impossible for Mr. Hadley to defend against broad evidenc of undefined prior bad acts. Finally, as previously stated, Mr. Hadley does not contest the issue of "intent" or "motive" in this case. Indeed, Mr. Hadley's attorney has previously stated that he will stipulate that the requisite intent exist in this case. In other words, Mr. Hadley is willing to affirmatively act to remove the issue of intent from this case. As a result, no prior bad act evidence should be admitted under Rule 404(b) of the Federal Rules of Evidence.

Of course, as previously articulated by counsel for Mr. Hadley, we believe that any evidence of sexual conduct between Mr. Hadley and Cory Kay is more prejudicial than probative under the balancing test of Rule 403 of the Federal Rules of Evidence.

In order to simplify the issues that are pending before this Court and to ensure that Mr. Hadley's position in this matter is not mistaken, Mr. Hadley offers the following admissions or stipulation, in this case, as long

as evidence of prior bad acts under Rule 404(b) are not admitted by the trial court:

COUNT VII AND VIII:

Count VII and VIII of the superseding indictment charge Mr. Hadley with aggravated sexual abuse under Title 18 U.S.C. Section 2241(a)(1). In essence, Mr. Hadley is charged with knowingy causing another person to engage in a sexual act by using force against the other person, namely Amadee Roy. An act is done knowingly if it is done voluntarily and intentionally, but not because of mistake or accident or other innocent reason. If the jury finds that the acts alleged within counts VII and VIII of the superseding indictment occurred, then Mr. Hadley is willing to stipulate or concede or admit that none of the acts were done because of mistake or accident or other innocent reason. The issue of intent or motive does not exist.

COUNT IX AND XI:

Counts IX and XI of the superseding indictment charge Mr. Hadley with abusive sexual conduct under Title 18 U.S.C. Section 2244(a)(3). Count IX simply charges Mr. Hadley with engaging in "sexual contact" with Amadee Roy, who was between the ages of 12 and 16 at the time that the touching occurred. Count XI essentially charges Mr. Hadley with engaging in sexual contact with Fernando Yazzie, who had not yet attained the age of twelve years. As long as the jury in this case is convinced that "sexual contact" occurred between Mr. Hadley and the two minor children mentioned in counts IX and XI of the superseding indictment, then Mr. Hadley is willing to concede, stipulate or admit that the act occurred knowingly. In other words, Mr. Hadley is willing to concede that the act took place without mistake, accident or other innocent reason. Mr. Hadley is willing to admit, concede or stipulate that—if the sexual contact occurred—then it occurred with intent to arouse

or gratify the sexual desire of any person. See Title 18 U.S.C. Section 2245(3).

COUNT X:

Count X of the superseding indictment charges Mr. Hadley with molestation of a child under Arizona law, A.R.S. Section 13-1410, by directly touching the private parts of Jonathan Tsosie, an Indian child under the age of fifteen years, during October, 1986. Count X essentially charges Mr. Hadley with directly or indirectly touching the private parts of Jonathan Tsosie in a "knowingly" manner. Under Arizona law, the term "knowingly" requires that Mr. Hadley must have been aware of or believed that he was completing the touching required by the statute. See A.R.S. Section 13-105(6). As long as the jury finds that the sexual molestation occurred as charged in the indictment beyond a reasonable doubt, then Mr. Hadley is willing to admit, concede or stipulate that the act took place "knowingly" as defined by Arizona law.

The Second Circuit has now held that evidence of prior bad acts is not admissible under Rule 404(b) if the defendant affirmatively acts to remove the issue of intent from the case. *United States v. Figueroa*, 618 F.2d 934, 941-42 (2nd Cir. 1980); *United States v. Manafzadeh*, 592 F.2d 81, 87 (2nd Cir. 1979); *United States v. O'Connor*, 580 F.2d 38, 41 (2nd Cir. 1978); *United States v. Williams*, 577 F.2d 188 (2nd Cir. 1978), cert. denied, 439 U.S. 868 (1978). Other courts have held that evidence of prior misconduct under Rule 404(b) cannot be admitted unless specific intent is actually a disputed issue in the case. Mr. Hadley's position affirmatively shows that intent is not a disputed issue in the case. Moreover, proof of the acts charged in this case tend to infer the existence of intent, thereby removing the need for prior misconduct evidence. *United States v. Shackleford*, 738 F.2d 776, 781 (7th Cir. 1984).

Although the Ninth Circuit has not yet established a clear rule that intent may be affirmatively removed from the case by the defendant, its position supports the preclusion of other—crime evidence in this case in light of Mr. Hadley's admissions or proffered stipulation. See *United States v. McKoy*, 771 F.2d 1207, 1214 (9th Cir. 1985). Also see, *United States v. Drainman*, 784 F.2d 248, 254 (7th Cir. 1986); *United States v. Chaimson*, 760 F.2d 798, 805-06 (7th Cir. 1985).

In light of the fact that three charges have already been combined during the trial of this case, the admissibility of other prior bad acts in a case of this type will clearly cause substantial prejudice. The prejudice is unnecessary in light of Mr. Hadley's admissions and stipulation to remove the issue of intent from the case. The issue of intent is not central to the case in any event. The only genuine issue in this case is whether or not the acts occurred. Mr. Hadley's defense that the acts did not occur, but that the minor children were persuaded to make accusations against Mr. Hadley because of aggressive interviewing techniques on the part of the F.B.I. and other law enforcement officials. Please also see Mr. Hadley's previous memorandm entitled "Response to Motion in Limine to Permit Evidence of Defendant's Prior Bad Acts."

Respectfully submitted this — day of May, 1989.

/s/ _____

JOHN TREBON
Attorney for Verl Hadley

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

(Caption Omitted in Printing)

NOTICE OF APPEAL

Verl Hadley, by and through his counsel, John Trebon, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment, findings, and sentence entered on August 21, 1989.

Respectfully submitted this 24 day of August, 1989.

/s/ John Trebon
JOHN TREBON
Counsel for Verl Hadley

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 89-10428

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
VERL HADLEY,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Arizona

Argued and Submitted Aug. 16, 1990
Decided Nov. 14, 1990

Before WALLACE, ALARCON and WIGGINS, Circuit Judges.

WALLACE, Circuit Judge:

Hadley appeals his convictions for aggravated sexual abuse in violation of 18 U.S.C. § 2241(a)(1) and abusive sexual contact in violation of 18 U.S.C. § 2244(a)(2). He argues that the district court abused its discretion by improperly admitting evidence of prior acts of sexual abuse and explanatory expert witness testimony. He contends that insufficient evidence exists to convict him on one of the three counts on which he was found guilty.

Finally, Hadley challenges his sentence, on the ground that it was not imposed in accordance with the Sentencing Guidelines. The district court exercised jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction over this timely appeal pursuant to 28 U.S.C. § 1291. We affirm.

I

Hadley is a former elementary school teacher who taught for eleven years at the Bureau of Indian Affairs School (BIA school) on the Navajo Indian Reservation at Chilchinbeto, Arizona. Complaints of sexual molestation led to an investigation of Hadley, which resulted in an indictment charging him with eleven counts of sexual abuse involving five minor victims. The district court granted Hadley's motion to sever, and the subsequent trial dealt only with counts seven through eleven of the superseding indictment. Counts seven through nine charged Hadley with aggravated sexual abuse, attempted aggravated sexual abuse, and abusive sexual contact. These charges arose from allegations that Hadley had committed forcible anal intercourse and other acts of sexual abuse against Roy, a student at the BIA school.

Roy testified at trial to three-separate incidents of sexual molestation by Hadley in late 1987 and early 1988. In addition, over Hadley's objection, the district court allowed other government witnesses to testify that Hadley had forcibly sodomized them when they were minors. The government also presented the expert testimony of Dr. Rosenzweig, a child psychiatrist, who testified on the issue of general behavior characteristics exhibited by victims of child sexual abuse.

The jury found Hadley guilty of the three crimes perpetuated against Roy. Hadley was acquitted on the remaining two counts, which involved less serious allegations by two other students. The district judge sentenced Hadley to 30 years' imprisonment for his conviction of aggravated sexual abuse as charged in count seven, and

to 108 months for the convictions on counts eight and nine. The judge ordered that the sentences for counts eight and nine be served consecutively to the sentence for count seven, and imposed fines totaling $20,000.

II

Hadley first argues that the district court should not have admitted the prior bad act testimony of witnesses who testified that Hadley had sodomized and sexually abused them when they were children. We review a district court's decision to admit evidence of prior bad acts under Fed.R.Evid. 404(b) only for an abuse of discretion. *United States v. Brown*, 873 F.2d 1265, 1267 (9th Cir.1989). Indeed, we have held that Rule 404(b) is an "inclusionary rule," under which evidence is inadmissible "only when it proves nothing but the defendant's criminal propensities." *United States v. Diggs*, 649 F.2d 731, 737 (9th Cir.), *cert. denied*, 454 U.S. 970, 102 S.Ct. 516, 70 L.Ed.2d 387 (1981). Therefore, the district judge is "accorded wide discretion in deciding whether to admit such evidence." *Id.*

Rule 404(b) allows the introduction of prior bad acts "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Fed.R.Evid. 404(b). We have held that evidence is admissible under Rule 404(b) if: (1) sufficient proof exists for the jury to find that the defendant committed the prior act; (2) the prior act was not too remote in time; and (3) the prior act is introduced to prove a material issue in the case. *United States v. Ross*, 886 F.2d 264, 267 (9th Cir.1989) (*Ross*), *cert. denied*, —— U.S. ——, 110 S.Ct. 1818, 108 L.Ed.2d 947 (1990); *United States v. Spillone*, 879 F.2d 514, 518-20 (9th Cir.1989) (*Spillone*), *cert. denied*, —— U.S. ——, 111 S.Ct. 210, 112 L.Ed.2d 170 (1990). In addition, if used to prove intent, the prior act must be similar to the offense charged. *Id.* at 519.

First, we hold that sufficient evidence of the prior bad acts existed for a jury to "reasonably conclude that the act[s] occurred and that the defendant was the actor." *Huddleston v. United States*, 485 U.S. 681, 689, 108 S.Ct. 1496, 1501, 99 L.Ed.2d 771 (1988). The witnesses testified in detail about the sexual abuse inflicted upon them by Hadley. This testimony clearly amounted to more than the "unsubstantiated innuendo" that the Supreme Court warned against in *Huddleston*. *Id.* Thus, the jury reasonably could have concluded that Hadley previously sodomized and abused these witnesses.

Second, one witness testified to a regular pattern of sodomy and sexual molestation that began when the boy was ten years old, and lasted until 1977 when he was fifteen. Hadley argues that this act is too remote in time to justify admissibility. We have previously declined to adopt an inflexible rule regarding remoteness in the context of Rule 404(b). *See Ross*, 886 F.2d at 267; *Spillone*, 879 F.2d at 514. Hadley stopped sexually abusing this witness ten year prior to the abuse for which he was convicted. The district judge found that "there certainly is a similarity in space and practice" between the prior act and the offense charged. The similarity of the prior act to the offense charged outweighs concerns regarding its remoteness. Thus, we hold that the district judge did not abuse his discretion in admitting this testimony. *Cf. Ross*, 886 F.2d at 267 (admitting evidence of a prior act that occurred 13 years beforehand based on the similarity of the offenses); *Spillone*, 879 F.2d at 519 (admitting evidence of a conviction more than ten years old).

Third, Hadley contends that the prior bad act evidence was not introduced to prove a material element in the case. Hadley was charged in count nine with abusive sexual contact. To demonstrate sexual contact, the government had to prove that Hadley acted "with an intent to abuse, humiliate, harass, degrade, or arouse or gratify

the sexual desire of any person." 18 U.S.C. § 2245(3). The district judge found that the prior acts "have to do with alleged activities of Mr. Hadley, of a sexually gratifying nature." In addition, the evidence helped to demonstrate specific intent, the proof of which was required in all three counts. On this basis, it was properly admitted. Of course, as pointed out above, if the prior acts are used to prove intent, those acts must be similar to the offense charged. The district judge found that they were, and we do not disagree. In all cases, Hadley isolated his student victims and performed acts of sexual gratification upon them, often including anal intercourse. We conclude that this similarity was sufficient to allow the admission of the prior acts as evidence of intent.

Hadley argues that *United States v. Powell*, 587 F.2d 443 (9th Cir.1978), requires a different result. Powell was convicted of conspiracy to possess marijuana with intent to distribute. *Id.* at 445. At trial the government offered proof of two prior convictions on three theories of relevance: intent, plan, and motive. *Id.* at 447. The district court refused to admit either of the prior convictions on the theories of intent or plan, but admitted one of the prior convictions as relevant to motive. *Id.* at 447-48. We reversed and remanded for a new trial. *Id.* at 449.

Hadley urges reliance on a single sentence in *Powell:* "When a defendant denies participation in the act or acts which constitute the crime, intent is not a material issue for the purpose of applying Rule 404(b)." *Id.* at 448. At trial, Hadley's defense was a denial of participation in the acts of which he was convicted: he offered not to argue the issue of intent. Thus, he contends, *Powell* precludes the government from proving intent with evidence of prior bad acts.

This is not the holding of *Powell*. Indeed, nothing in *Powell* on the issue of intent could have been its holding, because the district court's ruling on the issue was not challenged on appeal. Powell appealed the district court's decision to admit the prior conviction as relevant

to motive. The district court's ruling on intent was uncontested on appeal. Powell did not challenge the district court's refusal to admit the evidence on the theory of intent, as this ruling was favorable to him. Significantly, the government did not cross-appeal. Thus, the statement relied on by Hadley was nonbinding dicta which cannot control the outcome in a subsequent case.

Hadley's argument can be read to suggest we adopt the *Powell* dicta as persuasive authority. The statement, as interpreted by Hadley, goes too far. The government must prove every element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1074, 25 L.Ed.2d 368 (1970). This burden is not relieved by a defendant's promise to forgo argument on an issue. *See Spillone*, 879 F.2d at 518 (evidence of prior conviction properly admitted on issue of intent despite defendant's promise not to argue it). Hadley cannot preclude the government from proving intent simply by focusing his defense on other elements of his crime. Hadley's choice of defense did not relieve the government of its burden of proof and should not prevent the government from meeting this burden by an otherwise acceptable means. Rule 404(b) permits the government to prove intent by evidence of prior bad acts, and we have already held that admission of such a proof in this case was not an abuse of discretion under the rule.

We must also investigate, however, whether the prior bad acts should have been executed because their probative value was substantially outweighed by the danger of unfair prejudice. Fed.R.Evid. 403; *Ross*, 886 F.2d at 267; *Spillone*, 879 F.2d at 520. The evidence was highly probative on the question of intent, especially in light of the similarity found between the prior acts and the offense charged. The evidence was obviously prejudicial, but its prejudicial effect was limited by the instruction given by the district court. *United States v. Boise*, 916 F.2d 497, 502 n. 13 (9th Cir.1990) (as amended); *Spillone*, 879 F.2d at 520. The court properly instructed

the jurors that they could use the prior bad acts evidence to establish intent and motive only if they first found that the other evidence established beyond a reasonable doubt that Hadley committed the acts charged. The possibility of unfair prejudice did not substantially outweigh the probative value of the evidence.

Thus, we conclude that the district court did not abuse its discretion in admitting the evidence of Hadley's prior acts of sexual abuse.

III

Hadley next contends that the district court improperly admitted the expert testimony of Dr. Rosenzweig, a child psychiatrist who testified for the government. We review the district court's decision to admit expert psychiatric testimony for abuse of discretion. *United States v. Binder*, 769 F.2d 595, 601 (9th Cir.1985).

Hadley first argues that the expert testimony should have been excluded because it improperly bolstered the testimony of the minor victims. In support of this argument, he cites our decision in *Binder*, where we held that the district court erroneously admitted expert testimony that addressed the credibility of the abused children. In that case, however, "the experts testified that [those] particular children in [that] particular case *could be believed*." *Id.* at 602 (emphasis added). Dr. Rosenzweig, on the other hand, testified about general behavior characteristics that may be exhibited in children who have been sexually abused, and the testimony was therefore limited "to a discussion of a class of victims generally." *Id.* Because this general testimony merely "assist[ed] the trier of fact in understanding the evidence," *id.*, Dr. Rosenzweig did not improperly bolster the children's testimony.

Hadley next contends that Dr. Rosenzweig's testimony failed to quality under the test adopted in *Frye v. United States*, 293 F. 1013 (D.C.Cir.1923), and thus should not have been admitted. The *Frye* test allows admission of

"[e]vidence based on a novel scientific technique" only if the technique is generally accepted as reliable in the relevant scientific community. *United States v. Solomon*, 753 F.2d 1522, 1526 (9th Cir.1985) (*Solomon*). We have held, for example, that an expert's conclusions on sexual abuse based on a child's behavior with anatomically correct dolls must pass the *Frye* test. *See United States v. Gillespie*, 852 F.2d 475, 480-81 (9th Cir.1988). The district court found that Dr. Rosenzweig's testimony was not based on any "novel scientific technique," *Solomon*, 753 F.2d at 1526, and thus need not qualify under *Frye*. Because Dr. Rosenzweig merely testified to general behavioral characteristics based upon his professional experience, and did not employ any special techniques or models, the district court correctly concluded that the *Frye* test was not applicable.

Finally, Hadley argues that Dr. Rosenzweig's testimony was more prejudicial than probative, and therefore violated Fed.R.Evid. 403. The testimony helped to explain the testimony of the abused children, and therefore rendered " 'appreciable help' " to the jury. *Solomon*, 753 F.2d at 1525, *quoting United States v. Awkard*, 597 F.2d 667, 669 (9th Cir.), *cert. denied*, 444 U.S. 885, 969, 100 S.Ct. 179, 460, 62 L.Ed.2d 116, 383 (1979). Hadley points to no specific prejudicial effect that substantially outweighs this probative value, and therefore, discretion was not abused in the admission of the expert testimony.

IV

We next review Hadley's contention that there was insufficient evidence to convict him of count eight, attempted aggravated sexual abuse of Roy. In reviewing a claim of insufficient evidence, we must determine whether, viewing the evidence in the light most favorable to the government, "any rational trier of fact could have found the defendant[] guilty beyond a reasonable doubt." *United States v. Murray*, 751 F.2d 1528, 1534 (9th Cir.), *cert. denied*, 474 U.S. 979, 106 S.Ct. 381, 88 L.Ed.2d 335 (1985).

The facts relating to count eight indicate that in November 1987, Hadley gave Roy a ride home from a swimming pool and persuaded Roy to sit on his lap and drive the vehicle. Upon feeling Hadley's penis grow erect beneath him, Roy got off his lap and returned to the passenger seat. Only one month earlier, Hadley had used the same modus operandi to penetrate Roy's anal cavity, which led to his conviction on count seven for aggravated sexual abuse.

We have held that "attempt includes an element of specific intent even if the crime attempted does not." *United States v. Sneezer*, 900 F.2d 177, 179 (9th Cir. 1990). Thus, to justify a conviction on count eight, the government must have proven beyond a reasonable doubt that Hadley intended to engage in a prohibited sexual act with Roy in November 1987. *See* 18 U.S.C. § 2245 (2)-(3) (defining "sexual act" and "sexual contact"). In addition, to constitute an attempt, there must be more than mere preparation to commit a crime. "There must be 'some appreciable fragment of the crime' in progress." *United States v. Runco*, 873 F.2d 1230, 1232 (9th Cir. 1989) (*Runco*), *quoting United States v. Buffington*, 815 F.2d 1292, 1302 (9th Cir.1987).

The government introduced evidence that: (1) Hadley asked Roy to sit on his lap while Hadley was driving; (2) Hadley tried to get Roy to remove his pants; and (3) Roy felt Hadley getting an erection while Roy was sitting on Hadley's lap. In light of this evidence, together with the similar sexual abuse that occurred a month before, a rational jury could have found beyond a reasonable doubt that Hadley intended to engage in a sexual act with Roy. Furthermore, a rational jury could have concluded that Hadley's actions constituted sufficient steps "in the course of conduct planned to culminate in the commission of the crime." *Runco*, 873 F.2d at 1232. Thus, there was sufficient evidence to support Hadley's conviction on count eight.

V

Finally, Hadley contends that the district court erred by imposing a sentence not in accordance with the Sentencing Guidelines for his conviction on count seven. The district court did not apply the Sentencing Guidelines in imposing a 30-year sentence on that conviction. The court did follow the Sentencing Guidelines when it sentenced Hadley to nine years in prison on counts eight and nine.

Hadley's contention is without merit. We have held that the Sentencing Guidelines do not apply to conduct that occurred before November 1, 1987. *United States v. Gray*, 876 F.2d 1411, 1418 (9th Cir. 1989), *cert. denied*, —— U.S. ——, 110 S.Ct. 2168, 109 L.Ed.2d 497 (1990). There is no dispute that the conduct underlying the count seven conviction occurred in October 1987, prior to the effective date of the Sentencing Guidelines. Thus, the district court did not err when it declined to apply the guidelines to count seven.

AFFIRMED.

SUPREME COURT OF THE UNITED STATES

No. 91-6646

VERL HADLEY,

Petitioner

v.

UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 2, 1992